Supreme Court, U.S.
FILED

96 160 JUL 30 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

KENTUCKY STATE POLICE DEPARTMENT, *et al.*,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES PATRICK MULKEEN,
Counsel of Record for Petitioner
ROBERT E. HINERFELD
DONNA FIELDS GOLDSTEIN
PATRICIA M. BERRY
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

118 pp

QUESTIONS PRESENTED

I. In the case of law enforcement officers employed by a State, does the test for the bona fide occupational qualification ["**BFOQ**"] exception to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, [the "**ADEA**"], as construed in *Western Airlines, Inc., v. Criswell*, 472 U.S. 400 (1985), and *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), require the State employer to prove that it has implemented job fitness tests for its younger officers despite the State's showing that job fitness testing of retirement age officers is not a feasible or reliable test to determine the continued fitness of such officers for law enforcement duty?

II. Should back pay damages awarded to retired State employees in an age discrimination case be reduced – either as a matter of law or within the discretion of the trial court – by the State employer's payments of unemployment compensation to those retired State employees?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rules 14(b) and 29.6, the primary parties to this petition for writ of certiorari are, for the Petitioner, the Kentucky State Police Department, the Kentucky Secretary of Justice, the Commissioner of the Kentucky State Police Department, the Board of Trustees of Kentucky Retirement Systems, and the Commonwealth of Kentucky. The primary party for the Respondent is the Equal Employment Opportunity Commission.

The remaining third-party defendants to this action are individual Kentucky State Police Officers. The names of these officers may be found in the attachment to the complaint of the EEOC, filed in the District Court for the Eastern District of Kentucky, and in the third-party complaint of the Petitioners, also filed in the same court.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Kentucky State Police Department respectfully petitions this Court for a writ of *certiorari* to review two decisions of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The first opinion of the Sixth Circuit denoted *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665 (6th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) [***"Kentucky I"***], is reproduced in the Appendix beginning at App. 1. The Sixth Circuit's later opinion denoted *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir. 1996) [***"Kentucky II"***], is reproduced in the Appendix beginning at App. 11. The unpublished opinion of the United States District Court for the Eastern District of Kentucky, dated December 17, 1986, is reproduced in the Appendix beginning at App. 41. The unpublished judgments of the United States District Court for the Eastern District of Kentucky, dated May 23, 1994, and April 5, 1993, are reproduced beginning at App. 50.

JURISDICTION

The final judgment of the Sixth Circuit was entered on April 1, 1996.[1] Petitioner requested, and was granted by order of this Court dated June 21, 1996, an extension of time in which to file its petition for *certiorari* to and including July 30, 1996. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, renders it unlawful for an employer to discriminate on the basis of age except where age is a

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[1] Kentucky previously sought a writ of *certiorari* in reference to the Sixth Circuit's first opinion; that petition, which also addressed the BFOQ standard, was denied. Nonetheless, this Court is not foreclosed from review now. Indeed, "the Court on *certiorari* to review a final decree can reach back and correct errors in the interlocutory proceedings below . . . even though such an attempt was made without success." R.L. Stern, E. Gressman, S.M. Shapiro & K.S. Geller, *Supreme Court Practice*, § 2.2 (7th ed. 1993). The denial of *certiorari* is neither " 'the law of the case [nor does it] amount to *res judicata* on the points raised.' " *Id.* (quoting *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973)); *see Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (although *certiorari* initially was declined regarding lower court's decision to set aside a verdict, it was later granted as to the same issue when motion for new trial below was denied). As in *Mercer*, now that proceedings below have concluded pursuant to an erroneous reading of the law, it is appropriate for the Court to reach back and correct the Sixth Circuit's initial error.

"bona fide occupational qualification." The relevant portions of the statute, including the now-expired provision exempting State-employed law enforcement personnel from its coverage, are set forth in the Appendix beginning at App. 72. Other statutes included in the Appendix and discussed in this petition are 5 U.S.C. § 8335(b) and Kentucky Revised Statute 16.505(15), which provide for mandatory retirement of federal and State law enforcement personnel, respectively. (App. 80 and 82.)

STATEMENT

The circuits are split whether the ADEA requires an employer to institute health and fitness tests for all its law enforcement officers before it can establish that age is a BFOQ justifying mandatory retirement for these employees.[2] Because the moratorium exempting such programs from the ADEA's reach has expired,[3] review by this Court is required in order to assist the States in determining whether they must institute fitness-for-duty tests of all their employees before implementing mandatory retirement.

The circuits also are split whether the deduction of unemployment benefits from back pay awards in discrimination cases is barred as a matter of law or is a question left to the discretion of the trial court.[4] Where, as here, the entity providing the unemployment payments is the

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[2] *See, infra*, Sections I(B) and (C).

[3] *See* App. 77-79.

[4] *See, infra*, Section II.

same entity providing the back pay, trial courts should have discretion to determine that such payments properly are deducted from the back pay award because they are not "collateral."

The relevant facts are undisputed. In an effort to ensure the efficacy of its law enforcement officers, the State of Kentucky promulgated a policy mandating the retirement of its sworn officers, including state police officers, at age fifty-five. (App. 42, 82.) The statute mirrors comparable provisions in a number of states and is similar to regulations governing federal law enforcement officers. *See* 5 U.S.C. § 8335(b) (mandating retirement at age fifty-five for most federal firefighters and law enforcement personnel). Nonetheless, a divided Sixth Circuit – reversing the court below – found that the statute violated the ADEA. (App. 8-9.)

The ADEA, enacted by Congress in 1967, has been modified several times. *See Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 356 (1985) (discussion of amendments through date of the opinion). In 1974, it was amended to cover federal, state and local governments. 29 U.S.C. §§ 630(b) and 633a. In 1978, the ADEA's scope was expanded to regulate mandatory retirement programs requiring retirement prior to age seventy. Congress amended the Act yet again in 1986, deleting the age cap, but specifically exempting retirement programs affecting law enforcement personnel employed by the states. 29 U.S.C. (former) § 623(j) (West Supp. 1992). Pursuant to its sunset provision, the exemption lapsed on December 31, 1993. Pub.L. 99-592, § 3(b); 29 U.S.C. § 623(j).

In August 1984, the EEOC filed suit, *inter alia*, against the Kentucky State Police Department and the Commonwealth of Kentucky [collectively, "Kentucky" or "Petitioner"] claiming that the mandatory retirement program for sworn officers violated the ADEA. Kentucky defended its policy on the ground that the age limitation is a BFOQ for the safety-sensitive position of law enforcement officer.

The district court entered an order bifurcating the cause into liability and damage components, taking testimony pertaining to the liability prong during a three-day bench trial. After weighing the evidence and concluding that the mandatory retirement provision met the standards for a BFOQ, the district court entered judgment for Kentucky.

The EEOC appealed the district court's decision to the Sixth Circuit. In *Kentucky I* (App. 1), the Sixth Circuit conducted a tacit *de novo* review, reassessing the evidence, giving credence to the EEOC's experts, and, adding a new element to the BFOQ test articulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), reversed, holding that the age-based retirement provision was not a BFOQ for the position of state trooper.[5]

Liability established by the Sixth Circuit's reversal, the cause was remanded to the district court for further

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[5] As discussed in detail, *infra*, the Sixth Circuit considered dispositive the fact that Kentucky had no program to test regularly the fitness of all its officers, thus failing to establish that fitness was "reasonably necessary" to the essence of law enforcement – the first prong of the *Tamiami* test. (App. 6-7.)

proceedings. As a preliminary order of business, the trial court was asked to determine the proper scope of the EEOC's suit, *i.e.*, which retired officers, if any, were barred by limitations. Because claims advanced on behalf of a large number of troopers matured outside the limitations period, the EEOC argued for an equitable tolling.

The suit progressed as follows. In March 1983, two state troopers filed charges of discrimination with the EEOC. The EEOC's complaint, filed in 1984, alleged that Kentucky had been in violation of the ADEA "[s]ince at least January 1, 1979." (App. 17.) Acknowledging that any violation of the ADEA had not been "willful," the EEOC originally looked to the two-year limitations period.[6] (App. 15.) Adding a conciliation period to the calculation, the EEOC maintained that the suit properly embraced only those officers retired after October 19, 1981. (App. 16.)

During a status conference in February 1990, the EEOC learned that Kentucky had failed to post notices informing its employees of their statutory rights and had not specifically referenced "age" in its affirmative action policy. Given these facts, the EEOC contended, the statute of limitations equitably should be tolled back to April 6, 1978, the date when the ADEA amendment invalidating mandatory retirement programs went into effect. (App. 16.)

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[6] The ADEA provides for a two-year statute of limitations for age discrimination claims, expanding the limitations period to three years where the violation is "willful." 29 U.S.C. § 626(e)(1) (incorporating statute of limitations set forth in Portal-to-Portal Act, 29 U.S.C. § 255).

The parties stipulated that the testimony of three officers would represent the entire class in determining when the requisite notice was received.[7] (*Id.*) These officers testified that they first learned of their ADEA rights in 1983 when this Court decided *EEOC v. Wyoming*, 460 U.S. 226 (1983), upholding as constitutional a 1974 amendment extending the ADEA's coverage to the states. (App. 16-17.) Accordingly, the district court tolled the statute from January 1, 1979. It declined to push the limitations period further on the grounds that the EEOC itself had maintained and stood by the January 1979 cut-off date since the inception of the lawsuit. (App. 25.)

Evidentiary hearings on the individuals' claims for back pay were conducted in 1991 regarding the damage claims of officers mandatorily retired between October 19, 1981, and December 31, 1986.[8] Pursuant to the magistrate's proposed findings of fact and conclusions of law,

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[7] The court allowed Kentucky to offer only "by avowal" two documents which put the troopers on notice as early as 1978 that they had the right to equal treatment without regard to age. Thus, Kentucky sought to introduce a 1978 memorandum, issued by Kentucky's Department of Justice, which promised equal treatment, and a 1981 memorandum which explained the equal treatment policy and referenced an attachment outlining the procedure for filing complaints. (App. 18-22.)

[8] Paradoxically, Kentucky's mandatory retirement statute was lawful pursuant to the 1986 amendment exempting such plans from the ADEA's reach even while the district court took damages evidence for mandatory retirees from earlier years. (App. 77.) Kentucky remained subject to liability only because the amendment preserved causes of action already filed prior to its date of enactment. (App. 78.)

the district court entered final judgment for those individuals on April 5, 1993. (App. 14, 63.) In mid-1993, evidentiary hearings were conducted as to officers retired between January 1, 1979, and October 19, 1981. The district court adopted the magistrate's recommendations, entering its final order and judgment on May 23, 1994. (App. 14, 50.)

Kentucky timely appealed several issues raised by the district court's order. On April 1, 1996, the Sixth Circuit filed its opinion affirming in part and reversing in part. In *Kentucky II* (App. 11), the Sixth Circuit held that the district court appropriately expanded the group of retirees eligible for back pay to all claimants who had retired as of January 1, 1979. (App. 25.) The Sixth Circuit, however, reversed the district court's denial of the EEOC's motion to toll the statute to April 6, 1978 – the date on which the ADEA first addressed such mandatory retirement programs – thereby extending the limitations period more than six years. (App. 26.)

The Sixth Circuit also affirmed the district court's refusal to offset the exorbitant back pay awards by the amounts the troopers had received in unemployment compensation, holding that such deductions were barred as a matter of law.[9] (App. 37-39.)

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[9] Additionally, the court refused to deduct numerous other amounts, including social security deductions, taxes, and gross as opposed to net income, and significantly expanded the accrual period for prejudgment interest. (App. 30-38.)

REASONS FOR GRANTING THE PETITION

The State of Kentucky has been assessed damages in excess of nine million dollars for attempting to assure the safety of its citizens and maintain the efficacy of its law enforcement officers. Indeed, Kentucky's liability is grounded on an unnecessary interpretation of Congressional intent. Moreover, and ironically, even as the damage awards were being calculated in the district court, Kentucky's mandatory retirement age was valid under federal law.[10]

Finally, principles of federalism notwithstanding, the practical effect of this decision is to foreclose Kentucky, or any other State within a circuit which imposes additional factors to the BFOQ analysis, from requiring the same mandatory retirement age for State law enforcement officers which governs federal law enforcement officers.

Therefore, as it did in 1989, Petitioner asks this Court to reevaluate the applicable test for determining whether age is a BFOQ for law enforcement personnel. Review is required because, now that the moratorium has lapsed, the States are facing a Hobson's choice regarding their law enforcement officers. Should a State opt to protect its citizenry by implementing a mandatory retirement program, it once again must justify its decision as a BFOQ. In three circuits, it must implement testing of all officers in

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[10] In 1986, Congress – unable to decide whether age is a BFOQ for State-employed law enforcement personnel – imposed a moratorium on the invalidity of such mandatory retirement programs pending study of the issue. (App. 63, 64, and 68.)

order to do so. In at least two, possibly three, circuits, the ADEA is construed otherwise.

The BFOQ test for law enforcement officers' retirement programs, as construed by the Sixth and several other circuits, has split the circuits, placed an undue financial and safety burden on the States, and is not consistent with established jurisprudence. A State constrained by the modified BFOQ test must test the physical fitness of each of its law enforcement officers (no matter how young), ban from active duty those officers who do not pass muster, or incur substantial damages when the program is invalidated pursuant to a court challenge (which it surely will be if subjected to the expanded test). Of course, the State simply could proceed without a mandatory retirement program, thus forfeiting a potent tool which assists in maintaining an effective police force. The choice is both unfortunate and unnecessary under the ADEA.

Unless the applicable law is harmonized circuit-to-circuit, the validity of identical mandatory retirement provisions will vary by federal circuit and will be unknowable in those circuits which have not addressed the issue. Accordingly, Petitioner asks this Court to determine which articulation of the BFOQ standard follows the intent of the ADEA, *i.e.*, which test should apply nationwide?[11]

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[11] This inquiry may indicate reexamination by this Court of the broader issue concerning the effect, if any, of mandatory retirement for federal law enforcement officers as representative of Congressional intent regarding the ADEA as applied to the BFOQ exception for State law enforcement officers. *See Johnson*

The circuits also are split on the question of the deductibility of unemployment compensation from back pay awards. Some courts – the Sixth Circuit included – interpret *NLRB v. Gullett Gin Company, Inc.*, 340 U.S. 361, 363 (1951), to forbid the deduction of such payments. Other circuits leave the issue to the trial court's discretion. Further, where, as here, the unemployment payments are tendered by the State government – the very entity responsible for payment of back pay damages – nondeductibility of such payments from the total award represents a windfall to the employee and a double-payment by the State employer.

Indeed, the Sixth Circuit sympathized with Kentucky's position, recognizing the inherent contradiction in denoting these benefits "collateral." Because the Sixth Circuit considered itself bound by its own earlier decision in *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626-27 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984), the issue was not considered below. At minimum, guidance is needed as to the proper treatment of such deductions: Is the trial court empowered to weigh the equities or is double payment required by law?

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v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985) (federal provisions do not establish that age is a BFOQ as a matter of law for safety officers).

I. THERE IS A SPLIT: THE SIXTH, SEVENTH, AND THIRD CIRCUITS IMPROPERLY AUGMENT THE BFOQ TEST FROM *USERY V. TAMIAMI* BY IMPOSING THE BURDEN ON STATE EMPLOYERS TO ESTABLISH MINIMUM HEALTH AND FITNESS STANDARDS FOR LAW ENFORCEMENT OFFICERS WHO HAVE NOT ATTAINED THE MANDATORY RETIREMENT AGE.

A. *Tamiami* Does Not Require The Employer to Impose Fitness-for-Duty Tests on All of Its Employees.

In analyzing the validity of Kentucky's mandatory retirement statute, the district court in *Kentucky I* applied the proper test, following to the letter the BFOQ analysis announced in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), and adopted by this Court in *Western Airlines, Inc., v. Criswell*, 472 U.S. 400, 417-18 (1985). The Sixth Circuit, opting to follow the teachings of the Third Circuit, added an illogical component to the *Tamiami* inquiry, vitiating one prong of the applicable test and effectively foreclosing a BFOQ finding for any law enforcement mandatory retirement system.

The *Tamiami* test involves a two-part inquiry. *First*, the factfinder asks whether the " 'job qualifications which the employer invokes to justify his discrimination [are] reasonably necessary to the essence of the business.' " *Criswell*, 472 U.S. at 413 (quoting *Tamiami*, 531 F.2d at 236).

Second, the court inquires whether "the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry," by asking if the employer established a factual basis for believing

that "all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved." *Criswell*, 472 U.S. at 414. *Alternatively*, and of vital importance here, the employer may establish that it is " 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Id.* It was the application of this *alternative* second prong which was dispositive in *Tamiami* and in the district court's ruling below. Thus, in *Tamiami*, the Fifth Circuit upheld as not clearly erroneous the district court's finding that "individual examinations could not determine which individuals over the age of 40 would be unable to operate the buses safely." 472 U.S. at 415. The district court in *Kentucky I* reached a similar conclusion with respect to the State's fifty-five year mandatory retirement age for its police officers.

B. The District Court and the Court of Appeals at Odds: The *Kentucky I* Decisions.

In reaching its decision that Kentucky's mandatory retirement program did not offend the ADEA, the district court "carefully considered the testimony," and determined that Kentucky met the first prong of the *Tamiami* standard by showing that cardiovascular fitness and aerobic capacity were job qualifications for Kentucky State Troopers, such qualifications being "reasonably necessary" to the "essence" of law enforcement. (App. 43.)

As for the second prong of the *Tamiami* test, the court understood that, whereas aerobic capacity could be tested, "[s]uch is not the case for cardiovascular disease." (App. 45.) In determining that "non-intrusive testing for

cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age," the district court credited the testimony of Kentucky's experts who explained that aerobic capacity normally declines with age and that "the number of deaths due to ischemic heart disease skyrockets as people reach their late 50s." (App. 45.) The court gave due consideration to the testimony of the EEOC's experts, but concluded that testing protocols for cardiovascular disease were not sufficiently advanced medically to stand as a reliable substitute for the mandatory retirement age: "There is no test that will decisively determine that a specific individual does not have significant coronary disease."[12] (App. 45.)

Certainly the district court duly considered the evidence that the Kentucky State Police had not been "exemplary in terms of monitoring the health of its employees." (App. 43.) But, concluded the court, this factor was not enough to turn the tide. Guided by the First Circuit's teachings in *EEOC v. City of East Providence*, 798 F.2d 524, 530 (1st Cir. 1986), the court agreed that " 'a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification.' " (App. 44.)

In the first appeal, the Sixth Circuit gave a passing nod to this Court's directive that it accord "due regard to

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[12] The district court also was guided by Congress' action exempting law enforcement personnel from coverage. (App. 46.) Said the court, "Although the bill does not take effect until January, allowing the named plaintiffs a recovery here would be tantamount to a windfall." (App. 47.)

the findings of the trial judge on the credibility of witnesses," *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), but reevaluated the record and reversed, rejecting the district court's reliance on Kentucky's experts and giving greater credence to the EEOC's medical experts. (App. 4-5.)

The cause was forever lost, however, when the Sixth Circuit adopted the teachings of the Third Circuit in *EEOC v. Pennsylvania*, 829 F.2d 392 (3rd Cir. 1987), *cert. denied*, 485 U.S. 935 (1988), rather than follow the district court's reliance on *City of East Providence*. (App. 7.) Thus, the Sixth Circuit gave primary consideration to Kentucky's failure to test all of its officers for physical fitness and its apparent decision to permit certain younger officers to remain on the job in spite of health problems. (App. 3.)

The Sixth Circuit erred in failing to consider that, under *Tamiami*, an employer may establish a BFOQ by showing that such tests are ineffective and/or nonfeasible. Thus, because it misapplied the *Tamiami* inquiry at prong one, the court never reached the determinative issue at prong two. The Sixth Circuit is not alone in its erroneous application of the BFOQ test.

C. The Split Between the Circuits Is Not Reconcilable.

The Third and First Circuits follow divergent roads in BFOQ analysis. Put simply, in order to justify a mandatory retirement statute as a BFOQ, the Third Circuit requires employers to perform fitness-for-duty tests on its entire workforce. The First Circuit, on the other hand,

understands that such examinations may stand as evidence in support of the BFOQ, but are not dispositive and certainly not required under *Tamiami* and *Criswell*.

In *City of East Providence*, the EEOC argued that the district court had committed error by finding that strength, stamina, and ability to withstand stress were necessary job qualifications because the city maintained no program to test fitness criteria in all employees. 798 F.2d at 528-529. The First Circuit disagreed with the EEOC's position:

> Defendants' failure strictly to monitor physical standards among younger officers is not necessarily inconsistent with its recognizing that certain levels of strength, aerobic capacity, coronary fitness, etc., are necessary for effective police work. . . . [T]he city may feel that a more relaxed policy will nonetheless suffice to achieve its goal of maintaining a reasonably adequate force most of whose officers possess the requisite physical capabilities.

798 F.2d at 529 n.4. Indeed, continued the court:

> The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, *not as a sword to compel employers concerned with public safety to perfect their procedures for assuring the maximum physical fitness of younger employees.*

798 F.2d at 529 (emphasis added).

But the Third Circuit confronted *East Providence* head-on and rejected its reasoning:

> We believe this is precisely the kind of employment discrimination that Congress sought to

> eliminate by enacting the ADEA. Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages.

EEOC v. Pennsylvania, 829 F.2d at 396. The Third Circuit added a component to the *Tamiami* test: "[u]ntil minimum standards are developed, implemented and enforced, the [agency] cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to [its] business." 829 F.2d at 395.

Thus, confounding the analysis under the ADEA, and guaranteeing disparate results State-by-State, the circuits have formed two camps. The Sixth Circuit in *Kentucky I* highlighted the direct split and aligned itself with the teachings of the Third Circuit. *See also Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (labeling as "a telling bit of evidence" the fact that sheriffs were not required to take annual or other periodic physical examinations).

Also referencing the circuits' split is *EEOC v. Mississippi State Tax Comm'n*, 873 F.2d 97 (5th Cir. 1989). It pointed to *Kentucky I* and *Pennsylvania* as advancing the proposition that "an employer is precluded from making the first showing, *i.e.*, that the age related qualification is necessary, by a failure to develop, implement, and enforce minimum standards for that qualification." 873 F.2d at 98 (citations omitted). Conversely, explained the court, *City of East Providence* and *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447, 454 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985), treat the lack of minimum

standards or programs as evidence in determining the necessity of the asserted job qualification. *Id.*

The Fifth Circuit adopted the *City of East Providence* standard, reversing *en banc* a decision which had invalidated a mandatory retirement age for certain safety-sensitive law enforcement officers and remanding for further consideration. The previous panel, held the court, placed too much importance on the fact that the employer had failed to monitor the health and fitness of all employees: "[we] decline[] to hold that physical fitness can never be held to be reasonably necessary for job performance unless the employer has established formal standards and monitoring procedures." 873 F.2d at 98. Further, the court understood that the hard-and-fast *Pennsylvania* rule was not justified under this Court's analysis of the ADEA:

> The weight to be given the existence or absence of formal standards is for the fact finder to decide, with its finding subject to the appropriate appellate review on the entire record. The *Criswell* opinion emphasizes the importance of fact finding on a "case-by-case basis" under the ADEA structure.

873 F.2d at 99 (citing *Western Airlines, Inc. v. Criswell*, 472 U.S. at 422).

The *Pennsylvania* distinction – adopted by the Sixth and Seventh Circuits – is wrong. It misconstrues *Tamiami;* it imposes an onerous standard on the States and municipalities; it is unworkable.

D. The Issue Is Again Ripe; Review is Necessary to Guide the Lower Courts in Assessing Mandatory Retirement Programs For Law Enforcement Personnel.

Review of *Kentucky I* – and the augmented BFOQ analysis it implemented – is critical. Now that the sun has set on Congress' moratorium,[13] States once again must defend their mandatory retirement programs for law enforcement officers as BFOQs. The validity of these law enforcement retirement programs will turn upon which version of the *Tamiami* test is applied by the local circuit. Under the augmented test, a State will find itself liable for damages simply for failing to implement individual testing of its entire workforce, even where, as here, a factfinder has determined that such tests are ineffectual for law enforcement officers of retirement age. That is the effect of the Sixth Circuit's evisceration of *Tamiami*'s second prong.

And let there be no doubt – to insist that there can be no BFOQ without medical fitness testing of all employees is to nullify the second inquiry. As the Court will recall, *Tamiami* foresees a two-prong analysis: we first ask if the qualification is reasonably necessary to the enterprise and, second, whether substantially all individuals over the age cutoff would be unable to perform the job duties safely and efficiently or, *alternatively*, whether it would be impossible or highly impractical to assess the older persons on an individualized basis. *Western Airlines, Inc. v. Criswell*, 472 U.S. at 414-15.

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[13] *See* App. 67, 68, and 70.

Here, the alternative second prong decided the issue for the district court: age was a BFOQ for Kentucky's police troopers because deficiencies in medical technology rendered it "impossible or highly impractical" to test non-invasively for incipient cardiovascular problems. (App. 45.) But the Sixth Circuit preempted the inquiry regarding the efficacy of the tests altogether by holding that Kentucky had failed the *first* prong simply because it did not institute testing of all personnel. The inconsistency in requiring Kentucky to administer *ineffective* non-intrusive cardiovascular tests to its younger employees was not discussed by the Sixth Circuit.

EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984), explains the contradiction.[14] By criticizing law enforcement for not implementing physical examinations of its workforce, "the District Court ignored the testimony of the Patrol's expert witnesses as to the inadequacy of physical examinations and testing as methods of distinguishing between qualified and unqualified individuals over the age of sixty." *Id.* at 454.

Exactly so. Where the augmented BFOQ test is applied, a State will not be able to justify its program on the grounds that testing is ineffectual or not feasible.

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[14] The Eighth Circuit held that the lower court erred in emphasizing the employer's failure to require everyone to participate in regular fitness programs because *Tamiami* "does not evaluate the age restrictions in terms of an ideal employee. It simply requires objective evidence on whether the older employees can perform their duties or on whether there is a practical way to differentiate among employees other than age." 748 F.2d at 454.

Contrary to this Court's guidance, they are foreclosed from relying on *Tamiami's* second prong.

E. The Court Should Revisit Its Opinion In *Johnson v. Mayor and City Council of Baltimore* To The Extent It Gives No Effect to Congress' Disparate Treatment of Federal and State Law Enforcement Officers.

Congressional treatment of the retirement age for state and federal law enforcement officers seems anomalous. The district court in *Kentucky I* opined that the ADEA, as it applied to State law enforcement officers, "was at least philosophically inconsistent with the Congressional policy of having a mandatory retirement of age 55 for federal officers." (App. 48.) And commentators concur:

> [T]here is a glaring inconsistency in Congress's recognition of the need for federal law enforcement officers to be young and vigorous while simultaneously imposing on state and local governments the ADEA's requirements that may prevent these entities from maintaining their own young and vigorous police force. Although there is an absence of logic in justifying an exemption based solely on whether a law enforcement officer or firefighter is classified as federal as opposed to state or local, that is the current state of the law.

Martin Schiff, *The Age Discrimination in Employment Act: Whither The Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 St. John's L. Rev. 13, 20-21 (1993).

The Sixth Circuit was unmoved by the disparity, citing *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 370 (1985), as "clear indication" that, in the opinion of this Court, Congress had not "authorize[d] mandatory age limits for law enforcement personnel in the various states." (App. 8.)

But, given the 1986 amendment – which demonstrated a lack of consensus on the issue – there is no such "clear indication" of Congressional intent. Schiff, 67 St. John's L. Rev. at 14-15. Nor does *Baltimore* stand for such a broad proposition. The case simply addressed the question whether federal law enforcement provisions establish a BFOQ for age as a matter of law. 472 U.S. at 355. The answer was "no." 472 U.S. at 361-62. Unfortunate language in the opinion,[15] however, seemingly extends its holding far beyond the issue raised and leads reviewing courts erroneously to cite it for much broader principles.

Petitioner asks that the Court either reconsider its holding in *Baltimore* or clarify its reach. The factfinder should not be foreclosed, as the district court was here, from weighing Congressional intent as to the appropriate treatment of State law enforcement personnel by taking into consideration Congress' policy for *federal* law enforcement officers.

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[15] *E.g.*, 472 U.S. at 370 ("it would be error for a court . . . to give any weight, much less conclusive weight, to the federal retirement provision.").

II. WHERE THE STATE IS THE EMPLOYER, UNEMPLOYMENT BENEFITS PAYABLE TO THE RETIREES SHOULD BE DEDUCTIBLE AS A MATTER OF LAW FROM BACK PAY AWARDS.

The Sixth Circuit's error has been compounded by the excessive back pay award it prescribed in *Kentucky II* for the retired state troopers in this action.[16] But the error which is ripe for review concerns the court's belief that State unemployment compensation could not be deducted from back pay awards as a matter of law.

Review is needed in this area. As the cases make clear, courts long have been confused as to the proper reading of *NLRB v. Gullett Gin Company, Inc.*, 340 U.S. 361, 363 (1951), and the appropriate treatment of unemployment benefits. *See Lussier v. Runyon*, 50 F.3d 1103, 1108-09 (1st Cir.) (referencing a three-to-four circuit split in treatment of unemployment benefits in back pay awards), *cert. denied*, 116 S. Ct. 69 (1995). Indeed, *Lussier* references numerous internal splits within circuits, thus evidencing the unsettled state of the law at this time. *Compare Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d at 626-27 (as a matter of law, unemployment benefits should not be deducted), with *Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975) (trial court's decision to reduce

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[16] The court held that the troopers could be compensated for the overtime pay they might have accrued had they remained employed past their mandatory retirement dates, that they were entitled to expanded prejudgment interest, that social security and federal tax obligations they would have owed need not be deducted, and that, to the extent the troopers mitigated their damages, net rather than gross pay should be deducted. (App. 30-31.)

discrimination award by amount received in unemployment compensation affirmed as within trial court's discretion).

The Sixth Circuit reluctantly affirmed the trial court's refusal to deduct unemployment benefits from the back pay awards, apologetically noting that it was bound by a previous Sixth Circuit decision. In doing so, it recognized that a deduction was wholly appropriate because unemployment benefits could not be deemed "collateral benefits" when they are paid by the same entity which employed the troopers:

> Were this matter before us on a case of first impression, we may well have decided it differently. While some benefits are truly collateral, and to deduct them from back pay awards would provide a windfall to the unlawfully discriminating employer, we question the applicability of this doctrine when the employer is the state and where the benefit – unemployment compensation – is administered and largely financed by the same entity, for, in such cases, the benefit does not appear to be truly collateral. Nevertheless, we are bound by this circuit's holding in *Rasimas*.

(App. 38-39 (citation omitted.)) Thus, the Sixth Circuit read *Rasimas* to hold that unemployment payments were not deductible as a matter of law.

The Sixth Circuit's conclusion reflects a direct split amongst the circuits, the resolution of which is ripe for this Court's review. While half of the circuits, including the Sixth, hold that unemployment compensation may not, as a matter of law, be deducted from back pay

awards, the remainder reaching the issue have left the matter to the discretion of the trial court. Comment, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 Emory L.J. 325, 332-33 (1994) (authored by Thomas W. Lee). More importantly, the *Kentucky II* opinion is in line with other courts in recognizing that it belies common sense and does not advance the policy of the collateral source rule to deny such a deduction where the employer is the same entity which is awarding the benefits, *i.e.*, the State.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

JAMES PATRICK MULKEEN
Counsel of Record
ROBERT E. HINERFELD
DONNA FIELDS GOLDSTEIN
PATRICIA M. BERRY
MANATT, PHELPS & PHILLIPS
Attorneys for Petitioner

DATED: July 30, 1996

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KENTUCKY STATE POLICE DEPARTMENT, et al.,
Defendants-Appellees.

No. 87-5193.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 3, 1987.

Decided Nov. 1, 1988.

Rehearing and Rehearing En Banc
Denied Jan. 13, 1989.

Harriett Miller Halmon, Carolyn Howard, E.E.O.C., Memphis, Tenn., Justine S. Lisser (argued), E.E.O.C., Washington, D.C., for plaintiff-appellant.

Frank E. Haddad, Jr. (argued), Gary R. Hillerich, Louisville, Ky., for defendants-appellees.

Before ENGEL, Chief Judge,*
KENNEDY, Circuit Judge, and
EDWARDS, Senior Circuit Judge.

GEORGE CLIFTON EDWARDS Jr., Senior Circuit Judge.

The EEOC is plaintiff and appellant in this action in which certain state police officers joined by the EEOC are appealing a decision entered by the United States District

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* The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

Court for the Eastern District of Kentucky. At issue is a Kentucky statute establishing a mandatory retirement age of 55 years. The plaintiffs in this action contend that the Kentucky statute, by establishing the mandatory 55 age limit for employment, violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. Defendants contend that the 55-year limit is a Bona Fide Occupational Qualification.

The United States District Court took testimony from both parties in a three-day bench trial and then held for the defendants holding the 55-year limit to be a bona fide occupational qualification.

Some of the essential facts of the dispute are set forth in the following paragraph from the District Judge's opinion:

> This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed the possibility of such occurrences is undisputed in this case.

We believe this reasoning is sound on the statements related therein. But it does not take into account the total and the crucial facts of this case.

This record shows that Kentucky State Police has no program for regular testing of all of its officers for physical fitness.[1] At one time, Commissioner Elkins testified Kentucky State Police tried giving physical fitness tests to all members of the force but abandoned the practice. Elkins explained "it was putting people in the hospital rather than keeping them on the road working."

The record also discloses that Kentucky State Police permits officers to remain on the job in spite of known heart attacks or by-pass surgery. Equally important, in the facts with which we are confronted, is the fact that Kentucky State Police has no program for testing or maintaining the physical or the cardiovascular health of its officers. In fact, the record discloses that one veteran of the force died on patrol in his cruiser as a result of his fourth heart attack.

It is not, of course, the function of this court to tell the Kentucky State Police Commissioner how to operate its police force.

It is however, required of this court that we define whether or not Kentucky's "mandatory retirement age of 55 years" is a bona fide occupational qualification. The record in this case convinces us that it is not. First, this record demonstrates that the Kentucky State Police Force has no program for testing the fitness of its officers either

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[1] Each Post, however, does have a "special response team" which is subject to vigorous physical tests.

as to aerobic or cardiovascular health. We recognize that there are such fitness tests for a "special response team." Each Post has one such team. Each member of that team is given regular physical fitness tests including timed mile run in full gear, push-ups and sit-ups.

Still further bearing on the bona fides of the Kentucky State Police program are the facts, that the agency repeatedly permitted officers under the age of 55 who had known health problems including heart conditions to remain on the job with no diminution of duties, and that officers who had had heart attacks or by-pass surgery had been retained on the force. A 25-year veteran of the force, Eugene Coffey, died of his fourth heart attack at the age of 49 while on routine patrol in his cruiser.

One of the state expert witnesses, Dr. Lind, a physiologist, testified that an aerobic capacity of three liters was the number required for successful performance of all Kentucky State Police personnel. But on cross-examination, Dr. Lind admitted that most of the women officers and some competent Kentucky State Police male officers are unable to meet the three liter aerobic capacity test.

EEOC's expert witness was Dr. Pollock, a physiologist, and while he admitted that aerobic capacity is related to age, he also cited other factors such as genetics, general health, and lifestyle habits, including smoking, alcohol consumption and amounts of exercise. EEOC's other expert, Dr. Leon, a cardiologist, stated there was an increasing risk of coronary artery disease as people get older. He estimated the risk factor as being that six people out of 100 over the age of 55 would have a coronary

event within 10 years. Dr. Leon also testified that if persons who smoked were eliminated, physical examinations could tell with almost 100% accuracy who would be at risk of a coronary event within the next 10 years of life.

On appellate review of the District Court's finding in an employment discrimination case, we are required not to set aside findings of fact unless on appeal we can say that they are clearly erroneous and, of course, we are required to give due regard to the findings of the trial judge on the credibility of witnesses. See F.R.C.P. 52(a) and *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

We turn now to the actual language of the statute which controls this case. The Age Discrimination in Employment Act, 29 U.S.C. § 623 states as follows:

> (a) It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * *
>
> (f) It shall not be unlawful for an employer, employment agency, or labor organization –
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . .

The Supreme Court of the United States set forth the purposes of the Act just quoted in its decision in *Western*

Air Lines, Inc. v. Criswell, 472 U.S. 400, 410-411, 105 S.Ct. 2743, 2749-50, 86 L.Ed.2d 321 (1985). In *Criswell*, the Supreme Court said:

> Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons. Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to government income maintenance programs such as social security. H.R.Rep. No. 95-527, pt. 1, p. 2 (1977).

The *Criswell* case established that under the ADEA an employer must first establish that job qualifications are "*reasonably necessary* to the essence of his business." *Criswell*, 472 U.S. at 413, 105 S.Ct. at 2751 (quoting *Usery v. Tamiani Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir.1976)). (Emphasis in original). If successful in this endeavor, the employer must then show that it "is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry." 472 U.S. at 414, 105 S.Ct. at 2751.

The record in this case is similar to that in the case involving a Pennsylvania mandatory retirement statute for its state police. The court concluded:

> The factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all state troops to maintain a minimum level of health and fitness. Nor would the record support such a finding. This factual deficiency convinces us that the district court committed clear error in concluding that the PSP had demonstrated a bona fide occupational qualification reasonably necessary to its business. . . . Until minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business.

EEOC v. Pennsylvania, 829 F.2d 392, 395 (3rd Cir.1987).

We recognize that the District Court in this case relied on *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir.1986).

We believe its assumptions, however, are contrary to the legislative history of ADEA. Rejecting the *East Providence* case, the Third Circuit said:

> The *East Providence* court wrote:
>
> > The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring maximum physical fitness of younger employees. *Id.* at 529. The court stated that in establishing a mandatory retirement law to achieve its fitness goal, the city could rely on its belief that most

> younger officers will meet the necessary minimums. *Id.* at 529, n. 4.
>
> We disagree. We believe this is precisely the kind of employment discrimination that Congress sought to eliminate by enacting the ADEA. Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages. In any event, the district court did not find that most younger officers possess the purported BFOQs. And, in fact, the record suggests the contrary.

EEOC v. Pennsylvania, 829 F.2d 392, 396 (3rd Cir.1987).

See also *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1198 (7th Cir.1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985), but see *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir.1984), *cert. denied*, 474 U.S. 828, 106 S.Ct. 88, 88 L.Ed.2d 72 (1985).

We recognize that ADEA has recently been amended to permit police and firefighters to be mandatorily retired until 1993. Congress, however, explicitly exempted all causes of action arising under ADEA before January 1, 1987 from this change.

There is no doubt, of course, that Congress can authorize mandatory age limits for law enforcement personnel in the various states. We read *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 370, 105 S.Ct. 2717, 2726, 86 L.Ed.2d 286 (1985), as clear indication that the Supreme Court does not believe Congress has done so in language applicable to our instant case.

The judgment of the District Court holding that the Kentucky State Police 55-year age limit is a bona fide

occupational limitation is reversed. The case is remanded to the District Court for any further proceedings which may be required.

ENGEL, Chief Judge, dissenting.

I respectfully dissent. Contrary to the conclusion of the majority, I agree with United States District Judge Bertelsman that the Kentucky State Police Department has adequately demonstrated a bona fide occupational qualification in this case.

In *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir.1988), a companion case which we heard with this case, plaintiffs challenged the mandatory retirement age for Tennessee conservation officers. In that case, despite the fact that mandatory retirement would protect older conservation officers from the dangers of working alone and far from any assistance, I concurred in invalidating the mandatory retirement policy; the record there disclosed inconsistent application of the policy and revealed a lack of bona fides by the State of Tennessee.

This case, however, discloses no such lack of good faith by the Kentucky State Police. Accordingly, I would affirm for the reasons set forth in Judge Bertelsman's district court opinion of December 17, 198[illegible]

490 U.S. 1066, 104 L.Ed.2d 631

KENTUCKY STATE POLICE DEPARTMENT, petitioner, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. No. 88-1543.

Case below, 860 F.2d 665.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

May 15, 1989. Denied.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
Cross-Appellant (94-6049),

v.

KENTUCKY STATE POLICE DEPARTMENT,
Kentucky Secretary of Justice, Commissioner of Kentucky State Police Department,
Defendants-Appellants
(94-5850), Cross-Appellees,

Commonwealth of Kentucky,
Defendant-Appellee,

Board of Trustees of Kentucky Retirement Systems,
Defendants Third Party, Plaintiffs-Appellees,

George E. Arflack, et al., Third Party Defendants-Appellees,

Harold Kinman, Gilbert Baxter, Louise Bailey, Estate of Troy Bailey, Third Party Defendants-Appellants (94-6235),

Tyndale Brown, Appellant (94-6050).

Nos. 94-5850, 94-6049, 94-6050 and 94-6235.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 8, 1996.
Decided April 1, 1996.

On Appeal from the United States District Court for the Eastern District of Kentucky; William O. Bertelsman, Chief Judge.

Philip B. Sklover, Johnny J. Butler, E.E.O.C., Washington, DC, George C. Bradley, Joseph Ray Terry, Terry Beck, E.E.O.C., Memphis, TN, and Mary L. Clark (argued and

briefed), Office of Gen. Counsel, Washington, DC, for E.E.O.C.

Gary R. Hillerich (argued and briefed), Louisville, KY, and Frank E. Haddad, Jr., Louisville, KY, for Kentucky State Police Dept., Kentucky Secretary of Justice, and Com'r of Kentucky State Police Dept.

William B. Pettus, Asst. Atty. Gen., Frankfort, KY, for the Com. of Kentucky.

Robert W. Kellerman (briefed), and William E. Johnson, Stoll, Keenon & Park, for Bd. of Trustees of Kentucky Retirement Systems.

William Henry Van Herp (briefed), Van Herp & Howell, Covington, KY, for Arthur Emmons, Harold Kinman, Gilbert Baxter, Louise Bailey, James Powell and Samuel E. King.

Christopher M. Hill (briefed), William D. Kirkland, and Sarah M. Jackson, McBrayer, McGinnis, Leslie & Kirkland, Frankfort, KY, for James B. Jones, Virgil K. Miller, Leo Reynolds, Algin Roberts, Winston Kuykendall, Edward L. Wright and Paul M. Smith.

David Van Horn (briefed), Lexington, KY, for Erma Jean Laferty, John Miller and Kenneth D. Russell.

James M. Baker (briefed), Frankfort, KY, for Gail McCarty, James Henry Mayes, Rose V. Mayes and William Starks.

George F. Rabe (briefed), Lexington, KY, for Willian G. Mullins.

Dave Whalin (briefed), Landrum & Shouse, Louisville, KY, for Bettye A. Sherrard.

George F. Rabe (briefed), Lexington, KY, for William G. Mullins.

Catesby Woodford, Miller, Griffin & Marks, Lexington, KY, and James E. Baker, Frankfort, KY, for Gail McCarty.

Richard Clay (briefed), Clay & Clay, Danville, KY, for Tyndale Brown.

Before: ENGEL, KENNEDY, and SUHRHEINRICH, Circuit Judges.

KENNEDY, Circuit Judge.

This case presents cross appeals from the District Court's judgment awarding relief to Kentucky state troopers mandatorily retired at age fifty-five under KY.REV.STAT. ANN. § 16.505(15) (Baldwin 1994). The Kentucky State Police Department ("KSP") contends that the District Court erred by tolling the statute of limitations for state troopers retired before October 19, 1981 and by excluding two memos that it claims gave troopers constructive notice of their rights under the Age Discrimination in Employment Act of 1967 ("ADEA"); it also asserts that the District Court erred in calculating back pay and other relief for the mandatorily retired officers. In its cross appeal, the Equal Employment Opportunity Commission ("EEOC") contends that the District Court erred when it refused to toll the statute of limitations for employees retired between April 6, 1978 and January 1, 1979; when it denied EEOC's motion to amend the names of troopers not included in the original complaint; and when it refused to award prejudgment interest for the

entire back-pay period. For the following reasons, we shall affirm in part and reverse in part.

I

EEOC sued KSP and other defendants on August 29, 1984, alleging that KSP's policy of mandatorily retiring state troopers at age fifty-five violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1). Following a bench trial, the District Court upheld Kentucky's mandatory retirement policy on the grounds that, for state troopers, age constituted a bona fide occupational qualification. After reversal by this court, *EEOC v. Kentucky State Police Dep't*, 860 F.2d 665 (6th Cir.1988), *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989),[1] the District Court entered judgment providing back pay and other relief to the officers mandatorily retired under the policy between October 19, 1981 and December 31, 1986. The District Court subsequently entered a judgment providing relief for officers retired between January 1, 1979 and October 19, 1981.

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[1] On October 31, 1986, Congress amended section four of the Age Discrimination in Employment Act of 1967, 28 U.S.C. § 623, to make age a bona fide occupational qualification for law enforcement personnel whose duties "are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State. . . ." This amendment became effective on January 1, 1987, but it preserved cause of actions, such as the present case, that were in effect before that date.

This appeal presents three main issues: whether the District Court appropriately tolled the statute of limitations; whether the District Court properly excluded two documents KSP offered to show that the officers had constructive knowledge of their rights under ADEA; and whether the District Court properly calculated the officers' back pay awards and other relief.

II

The first issue raised in this appeal concerns the District Court's decision to toll the statute of limitations for troopers retired before October 19, 1981. On March 28, 1983, two KSP officers challenged KSP's mandatory retirement policy by filing ADEA charges with the EEOC. The officers stated that they did not become aware of the legal grounds for their age discrimination claim until March 2, 1983, when the Supreme Court decided *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), which held that Congress could constitutionally extend the protection of the Age Discrimination in Employment Act of 1967 to state and local government employees.

On the basis of the officers' complaints, EEOC brought an ADEA suit against KSP's mandatory retirement policy for state troopers on August 29, 1984. On July 3, 1989, EEOC filed a report with the District Court in which it acknowledged that it could only seek relief for state troopers mandatorily retired on or after October 19, 1981. EEOC reached this conclusion after choosing a two-year statute of limitations, which it believed was appropriate because KSP had not willfully violated the ADEA.

EEOC added to the two-year limitations period a ten-month and ten-day period in which it tried to negotiate a voluntary settlement of the dispute; subtracting this combined amount of time from the August 29, 1984 complaint, the EEOC arrived at a cut-off date of October 19, 1981. During a February 23, 1990 status conference, however, EEOC learned that KSP had failed to post notices alerting employees to their rights under the ADEA.[2] At that conference, EEOC also learned that KSP's employee manual specifically omitted any reference to age discrimination as a prohibited employment practice.

EEOC moved the District Court to toll equitably the statute of limitations to April 6, 1978, the date on which ADEA took effect for state and local government employees. The District Court referred the matter to a magistrate judge, who heard testimony on the issue of officers' actual or constructive knowledge of their rights under the ADEA. The various parties to the suit stipulated that the testimony of three mandatorily retired officers would be representative of the class of troopers retired before October 19, 1981. These troopers testified that they lacked actual or constructive knowledge of their rights to be free from age discrimination because they

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[2] 29 U.S.C. § 627 provides:

Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

had never seen any ADEA notice posted by KSP or otherwise been informed by KSP of their rights, and that they had relied on the KSP employee manual's description of the mandatory retirement policy. The three officers also testified that they did not become aware of their rights until *EEOC v. Wyoming* was decided.

The District Court held that KSP's failure to post the required ADEA notices and its omission of a reference to age discrimination in its employee manual constituted "affirmative misleading conduct" sufficient to toll the statute of limitations until January 1, 1979. Nevertheless, the District Court declined to toll the limitations period beyond January 1, 1979 because that was the date EEOC had "plead all these years."[3]

The District Court also denied EEOC's motion to amend its complaint to add three troopers retired after January 1, 1979 who did not learn of the suit until it was on remand. The EEOC had relied on the Kentucky Retirement Board (the "Board") for the names of potential claimants. The Board had not included the names of these three officers because each had retired before his fifty-fifth birthday in reliance upon the mandatory policy.[4] In

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[3] In its August 29, 1984 complaint, the EEOC alleged that KSP's ADEA violations had gone on "[s]ince at least January 1, 1979."

[4] Officer Brown retired seven months prior to his mandatory retirement date to run for sheriff. Officer Herrell retired one month before his mandatory retirement date by using up his remaining vacation days. Officer McMullen retired on his mandatory retirement date, but he was predeceased by his wife, who was the only named beneficiary of his benefits. When McMullen died in 1985, the Retirement Board did not

1993, the District Court also denied EEOC's motion to amend its complaint to add six officers who had been mandatorily retired between April 6, 1978 and January 1, 1979.[5]

How we resolve the tolling issue depends in part on our view of the District Court's decision to exclude two documents KSP offered to show troopers' constructive knowledge of their right to be free from age discrimination; because the troopers had such knowledge, KSP argued, the statute of limitations should not have been equitably tolled.

At a hearing on February 5, 1993, KSP sought to introduce two documents that, it claimed, showed that the troopers had constructive notice of their right to be free from age discrimination. The first document, dated April 3, 1978, was on the stationery of the Office of the Secretary of Kentucky's Department of Justice. The memo was entitled "Equal Employment Opportunity Policy," and it stated, in part:

> 2. All employees of the Department shall be treated impartially without regard to race, color, religion, national origin, sex, age,

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maintain his records because there were no beneficiaries to whom it owed money.

[5] The EEOC sought to add Officers Bailey, Baxter, Ginn, Kinman, Overstreet, and Turner. The District Court subsequently added Officers Ginn and Turner to the complaint. Kentucky's retirement policy required officers to retire on the first day of the month following their fifty-fifth birthday; because these two officers' birthdays were in December of 1978, their effective retirement date, January 1, 1979, was within the tolling period established by the Court.

> or handicap in rates of pay or other forms of compensation, promotions, upgrading, demotion, or transfer, lay off, termination, and selection for training programs within the Department.
>
> Any Department position which warrants the application of the bonafide (sic) occupational qualification exception shall be documented as such.

3. This order is to be displayed in a prominent place.

The second document, which was dated May 21, 1981, was on the stationery of the Kentucky State Police; it was a memorandum from Marion D. Campbell to "All Employees" that stated, in part:

> It is the policy of the Bureau of State Police to provide equality to all employees and persons regardless of their race, creed, color, handicap, national origin, sex, age, political affiliation or beliefs.

This memorandum went on to announce the designation of Major Larry Fentress as the agency's Equal Employment Opportunity Counselor, and it referred to an attached memo describing the Department of Justice's procedure for filing complaints.

At the February 5, 1993 hearing at which KSP first tried to enter these documents into evidence, the District Court excluded them on the ground that the evidence was unduly delayed: "This case has been going on since 1983. You had plenty of time to go through the file. The Court is not taking any new evidence now."

On March 11, 1993, KSP filed a motion to supplement the record with the District Court in which it again sought to admit the 1981 memo into evidence. KSP attached an affidavit from Captain Larry Fentress, in which Fentress stated that "the failure to discover these documents in the original search was the result of excusable neglect, due to the fact that the central files of the Kentucky State Police dating to these time periods had been microfilmed in 1981 and either lost or inadvertently destroyed . . . " and that the documents were ultimately found in collateral records. KSP also attached an affidavit from Gary Bush, an analyst in the Kentucky State Police Information Services Branch, stating that the microfilmed records were either lost or destroyed. On April 5, 1993, the District Court denied "defendants' motion to supplement the record . . . for the reasons stated by the Court at the February 5, 1993, hearing and for the additional reasons stated in the responses . . . to the motions. . . . " In their responses to KSP's motion, the EEOC and other lawyers for the mandatorily retired troopers had argued against supplementing the record on the grounds that the 1981 memo in question applied to KSP's civilian employees, not its troopers; that there was no evidence that any of the mandatorily retired troopers actually received a copy of the memo; and that KSP's employee manual, by which it informed employees of all KSP policies, conflicted with the 1981 memo by specifically excluding age discrimination from a list of prohibited employment practices.

On June 10, 1993, KSP sought to introduce the April 1978 document on cross-examination of two former KSP officers when the case was before the magistrate judge. In

attempting to authenticate the 1978 memo, KSP's attorney asked Officer Newman whether he was aware that the Kentucky Department of Justice regularly issued memos that included the direction that they be posted in a prominent place, and whether that direction was regularly obeyed. Officer Newman responded: "Not knowing specifically what you are talking about, I would assume they would be, yes." KSP then handed Officer Newman the April 3, 1978 document, asked whether he had seen documents of this type, and then asked him to read the document out loud. Counsel for the officers objected on the grounds that there was no "showing that Mr. Newman regularly got these types of documents." The court then asked Officer Newman what his position was on April 3, 1978. Officer Newman replied that he was "a captain in supply." The court then asked, "You were not the commissioner?" Officer Newman replied, "No, sir. I have never seen this document." The magistrate judge then sustained the objection but allowed it to be offered by avowal.

KSP also sought to introduce the 1978 document before the magistrate judge during cross-examination of Officer Mullins. Officer Mullins testified that he was an attorney with KSP between 1975 and 1980, and that during the course of his duties he would review information that came from the Kentucky Department of Justice. KSP's attorney asked Officer Mullins whether he could recall any situations where a document like the 1978 Department of Justice memo would not have been displayed in a prominent place. Officer Mullins responded: "[T]hat would have probably gone to our Equal Employment Opportunity counselor at that time. It may – may or

may not have come through my office; I don't know." KSP moved to admit the document into evidence, but the magistrate judge sustained one of the officers' attorney's objection.

A

KSP first argues that the District Court erred in not granting its motion for summary judgment on the grounds that all claims were time-barred. We review the District Court's legal conclusion as to the date the claims accrued *de novo*. *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir.1989).

KSP cites *Delaware State College v. Ricks*, 449 U.S. 250, 259, 101 S.Ct. 498, 504-05, 66 L.Ed.2d 431 (1980), for the proposition that the statute of limitations period begins to run when the aggrieved person becomes aware of the allegedly discriminatory act. According to KSP, Kentucky State Troopers became aware of the allegedly discriminatory act on the date they were hired, for that is when they would have been informed of KSP's mandatory retirement policy. While that might be true if the policy being challenged were facially neutral, as EEOC argues, a different rule applies when the statute at issue is facially discriminatory. In *Lorance v. AT & T Technologies, Inc.*, the Supreme Court noted that "[t]here is no doubt, of course, that a facially discriminatory . . . system can be challenged at any time" and offered the following rationale for the distinction:

> With a facially neutral system the discriminatory act occurs *only* at the time of adoption, for each application is nondiscriminatory (seniority

> accrues for men and women on an identical basis). But a facially discriminatory system (*e.g.* one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied.

490 U.S. 900, 912 & n. 5, 109 S.Ct. 2261, 2269 & n. 5, 104 L.Ed.2d 961 (1989). KY.REV.STAT. ANN. § 16.505(15) mandatorily retires state troopers on the first day of the month following their fifty-fifth birthday. As such, it facially discriminates between troopers younger than fifty-five years of age and those older than fifty-five years of age. Therefore, a claim becomes ripe when the statute is applied, *e.g.* when the trooper is mandatorily retired. Thus, the District Court did not err in denying KSP's motion for summary judgment.

KSP next argues that the District Court erred in tolling the statute of limitations period back to January 1, 1979. In response, EEOC argues that the District Court erred by not tolling the statute of limitations period further, until April 6, 1978. We review the District Court's decision to deny or grant equitable tolling for abuse of discretion. *E.E.O.C. v. O'Grady*, 857 F.2d 383, 394 (7th Cir.1988).

This Circuit has identified five factors to consider when determining the appropriateness of equitably tolling a statute of limitations:

> (1) lack of actual notice . . . ; (2) lack of constructive knowledge . . . ; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) plaintiff's reasonableness in remaining ignorant of the notice requirement.

Andrews v. Orr, 851 F.2d 146, 151 (6th Cir.1988). Here, the troopers lacked actual notice of their rights under ADEA. The magistrate judge heard testimony from three officers, and all parties stipulated that these officers' testimony was representative of the class of officers retired under Kentucky's policy. The three officers testified that they did not know of their rights under ADEA until the Supreme Court decided *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). Second, the District Court found that the troopers lacked constructive knowledge of their rights under ADEA because "[KSP] failed to post the required ADEA notices and the claimants relied on KSP's policy manual which lists everything but age as a part of its affirmative action policy." Third, the officers were diligent in pursuing their rights. Upon becoming aware of the Supreme Court's opinion in *EEOC v. Wyoming*, officers filed timely complaints with the EEOC. Fourth, KSP can claim no unfair prejudice when it failed to comply with ADEA's posting requirement. Finally, the officers' delay in bringing their claim was reasonable because only after the Supreme Court decided *EEOC v. Wyoming* did the troopers believe they could bring an ADEA challenge to Kentucky's mandatory retirement policy for state troopers.

KSP argues that the District Court erred in equitably tolling the statute of limitations because KSP was not guilty of misconduct. KSP argues that "[a] party seeking protection of the equitable tolling doctrine must establish that the party's ignorance of the filing requirements is attributable to the employer's misconduct." KSP's argument mistakes the doctrine of equitable estoppel for that of equitable tolling. Equitable estoppel "comes into play

if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir.1990), *cert. denied*, 501 U.S. 1261, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991). Equitable tolling, however, "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Id.* at 451. Thus the District Court did not need to find that KSP had engaged in wrongful conduct for equitable tolling to apply. Moreover, the District Court *did* find some wrongful conduct; it held that "[e]ven though KSP did not 'maliciously' leave age out of its affirmative action policy, leaving it out coupled with the failure to post ADEA notices as required is sufficient to meet the requirements of some 'affirmative misleading conduct' on the part of defendants to toll the statute of limitations." Thus the District Court did not abuse its discretion by tolling the statute of limitations period.

EEOC argues that the District Court did, however, abuse its discretion by not tolling the limitations period back until April 6, 1978, the date on which ADEA became applicable to states and localities. The District Court rejected EEOC's motion to toll the limitations period until April 6, 1978 because in its August 29, 1984 complaint, EEOC alleged that KSP had violated the ADEA "[s]ince at least January 1, 1979." The District Court appears to have rejected EEOC's motion to toll the limitations period until 1978 on the grounds that "the January 1979 date . . . is what has been plead all these years."

EEOC argues that it chose 1979 as the date to include in its complaint only because it did not yet know that

KSP had failed to post the required ADEA notice and that KSP had omitted age discrimination from the list of prohibited employment practices in its employee manual. EEOC also argues that "[a]ll of the reasons that support the district court's decision to toll the limitations period from January 1, 1979 apply with equal force to the period from April 6, 1978. . . . " We agree. Having decided that the limitations period should be tolled for troopers retired between 1979 and 1981, the District Court should have tolled the limitations period until 1978.

Likewise, we find that the District Court abused its discretion in denying EEOC's motion to amend its complaint to add the names of three officers who were not included in the original complaint because Kentucky's Retirement Board, which furnished names of potential claimants to EEOC, failed to include these officers' names. The Board had not included the names of these three officers because each had retired before their fifty-fifth birthday in reliance upon the mandatory policy.[6] These three officers raise the same claims as other members of the class. The District Court did allow non-charge filing claimants who retired between January 1, 1979 and October 29, 1981 to "piggyback" on the original claimants' charges, but it denied piggybacking for these three officers on the grounds that "[t]here has to be some cut off somewhere." Although we would not ordinarily disturb a district court's legitimate efforts to bring a lengthy dispute like this to a close, we think it abused its discretion in denying EEOC's motion to amend. KSP was certainly on notice about the nature of the claims that would

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[6] *See supra* note 3.

be brought against it by officers retired during the period these three officers retired, and thus allowing these three officers to bring their complaints imposes no significant hardship on KSP. Moreover, but for the Kentucky Retirement Board's omission of their names, they would have been included in the complaint. For these reasons, we hold that EEOC may amend its complaint to add the names of the three officers retired after 1979.

B

Of course whether equitable tolling was proper also depends on whether the District Court properly excluded two documents KSP claims prove that officers were aware of their ADEA rights. We review the District Court's decision for a clear abuse of discretion. *Zamlen v. City of Cleveland*, 906 F.2d 209, 215 (6th Cir.1990), *cert. denied*, 499 U.S. 936, 111 S.Ct. 1388, 113 L.Ed.2d 444 (1991).

With respect to the April 3, 1978 memo on the Department of Justice stationery, we are inclined to believe that the District Court abused its discretion in excluding the memo during the February 5, 1993 hearing on the grounds of undue delay. First, KSP offered undisputed affidavits from two KSP employees that the document was not discovered until January of 1993 because records stored on microfilm were lost or destroyed when KSP moved its headquarters. Second, although, as the District Court correctly noted, this dispute had been ongoing since 1984 and thus the delay in bringing forth the evidence was significant, the tolling issue was not raised until 1990, when EEOC changed its position with

respect to whether officers retired before 1981 were time barred from bringing claims. Considering that the District Court allowed the EEOC in 1990 to add claimants retired between 1979 and 1981 even though the suit had "been going on since 1983," it appears the District Court abused its discretion in not granting KSP the same degree of flexibility.

Nevertheless, "even if the lower court's decision [to exclude evidence] amounts to an abuse of discretion, it will not be disturbed on appeal if it did not result in a substantial injustice. . . . " *Zamlen*, 906 F.2d at 216. Here, KSP sought to introduce the 1978 document to show that state troopers had constructive knowledge of their right to be free from age discrimination under the ADEA. If troopers had such constructive knowledge, equitable tolling would not be available to protect their otherwise untimely claims. KSP admits that it did not post the notices required under 29 U.S.C. § 627, which states:

> Notices to be posted
>
> > Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

If an employer fails to comply with § 627 by not posting the required ADEA notices, "the charge-filing period will not begin to run until the employee either retains an attorney or acquires actual knowledge of his rights under the ADEA." *Schroeder v. Copley Newspaper*, 879 F.2d 266, 271 (7th Cir.1989) (internal quotation marks omitted). KSP

did not comply with this section of the ADEA. Moreover, the 1978 document in question does not apprise employees of the existence of a statute of limitations; it does not mention the ADEA; and it does not mention any process of pursuing a complaint by contacting an EEOC officer. Moreover, KSP neither authenticated the document nor proved that it was actually posted or seen by KSP troopers. KSP first tried to authenticate the document by questioning Officer Newman. But Officer Newman testified that he had "never seen this document." KSP then tried to introduce it by asking Officer Mullins whether memos from the Department of Justice, such as the 1978 memo in question, were regularly posted in a prominent place and whether he could recall any occasions when the order to post such memos was not carried out. Officer Mullins responded that the 1978 memo "would have probably gone to our Equal Employment Opportunity counselor at that time. It may – may or may not have come through my office; I don't know. . . . I may or may not have seen it." For these reasons, we find no substantial injustice requiring us to overturn the District Court's decision to exclude the 1978 memo. *See Zamlen*, 906 F.2d at 216.

With respect to the 1981 memo, KSP filed a motion to supplement the record and attached to the motion two affidavits from KSP employees describing how the document came to be found in 1993, ten years after this dispute began. The District Court denied KSP's motion "for the reasons previously stated by the court at the February 5, 1993, hearing, and for the additional reasons stated in the responses (Docs.# # 318, 319, 324) to the motions." At the February 5, 1993 hearing, the District

Court had explained that it was excluding the document because of KSP's undue delay in bringing it before the court. The responses to the motions (Docs.# # 318, 319, 324) argued that the motion should be denied because the 1981 memo in question applied to KSP's civilian employees, not its troopers; that there was no evidence that any of the mandatorily retired troopers actually received a copy of the memo; and that KSP's employee manual, by which it informed employees of all KSP policies, conflicted with the 1981 memo by specifically excluding age discrimination from a list of prohibited employment practices. Although we remain skeptical about whether the offer of the memo was unduly delayed, we find that, considering the troopers' other objections, there was no substantial injustice requiring us to overturn the District Court's denial of KSP's motion to supplement the record with the 1981 memo. *See Zamlen*, 906 F.2d at 216.

III

This appeal also presents a number of issues concerning the appropriateness of the relief the District Court awarded to the mandatorily retired troopers. The District Court offset from the officers' back-pay awards any pension benefits they received from the Retirement Board between their date of retirement and December 31, 1986, the date at which back-pay awards ceased, and any amounts they would have been obliged to pay into the retirement system during those years.

The District Court offset the officers' back-pay awards by net, rather than gross, earnings troopers

received from other employment following their mandatory retirement. The District Court included within back-pay awards amounts for lost compensatory leave when it was reasonably certain that officers would have worked overtime. The District Court refused to offset income and social security taxes that would have been owed; it also excluded any unemployment compensation the officers received. The District Court awarded prejudgment interest on the back-pay awards at the rate of four percent compounded annually. However, the District Court ruled that prejudgment interest should only begin to accrue on January 1, 1987 rather than applying prejudgment interest to the entire period of the back-pay award.

Finally, the District Court found that the officers exercised reasonable diligence in mitigating their damages after being mandatorily retired. The District Court also found that the mandatorily retired officers could have continued to work after their fifty-fifth birthday and that certain employees who retired before the date of their fifty-fifth birthday were still eligible for relief because they retired in reliance on KSP's mandatory retirement policy.

KSP first argues that the District Court erred by awarding prejudgment interest when "there was absolutely no evidence of willfulness" regarding its violation of the ADEA. We review the District Court's decision to award prejudgment interest for abuse of discretion. *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1079 (6th Cir.1989). KSP's argument about the need to find a willful ADEA violation before awarding prejudgment interest is contrary to this Circuit's holding in *Tiemeyer v.*

Community Mut. Ins. Co.: "Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award." 8 F.3d 1094, 1102 (6th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1371, 128 L.Ed.2d 48 (1994); *see also Partington v. Broyhill Furniture Indus. Inc.*, 999 F.2d 269, 274 (7th Cir.1993) (noting that "prejudgment interest is . . . necessary to compensate a plaintiff fully for a loss suffered at time t and not compensated until t + 1, 2, 3 . . . n[and] is presumptively available in . . . suits under the age discrimination law") (citations omitted). Indeed, "it is ordinarily an abuse of discretion *not* to include prejudgment interest in a back-pay award. . . . " *Clarke v. Frank*, 960 F.2d 1146, 1154 (2d Cir.1992). Thus, we cannot conclude that the District Court abused its discretion in awarding prejudgment interest.

KSP next argues that the District Court abused its discretion by awarding compounded prejudgment interest. KSP contends that awarding compounded interest grossly overcompensates the mandatorily retired troopers because this method assumes that all income from a given year would be used for savings. As the Second Circuit has declared, "[b]ack pay . . . should ordinarily include compound interest." *Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir.1994). Back pay is awarded to make the claimant whole, and such relief "can only be achieved if [prejudgment] interest is compounded." *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994). We are inclined to agree, but we believe that the decision whether to award compound or simple interest is in the trial court's discretion. We find that the District

Court did not abuse its discretion by awarding compounded prejudgment interest.

EEOC argues, however, that the District Court erred in determining the period to which prejudgment interest should apply. EEOC argues that the District Court should have applied prejudgment interest to each year of the back-pay award. The District Court instead chose to apply prejudgment on the back-pay award starting on January 1, 1987 through the date of final judgment. It did so after accepting the findings of the magistrate judge, who understood the EEOC's proposal to apply prejudgment interest to the entire period of the back-pay award as follows:

> It appears that EEOC argues that prejudgment interest should run from an officer's actual date of retirement (i.e. the date when an officer was mandatorily retired in accordance with the policy in question) until the date of judgment. The Magistrate Judge rejects this position because, under this scenario, an officer who was mandatorily retired in 1984, and to whom this court has awarded back pay for the years 1985 and 1986, would be permitted to receive prejudgment interest on his back pay award for 1985 and 1986 beginning in 1984, notwithstanding the fact that, if he had been working, he would not yet have earned his 1985 and 1986 awards in 1984.

We believe that this reasoning is incorrect. Awarding prejudgment interest on a mandatorily retired trooper's lost wages in 1984, rather than beginning to apply it on January 1, 1987, does not mean that that trooper "would be permitted to receive prejudgment interest on his back-

pay award for 1985 and 1986 beginning in 1984. . . . " Thus, we believe the magistrate judge misinterpreted EEOC's proposed method for calculating prejudgment interest. EEOC's proposal largely tracked what the magistrate judge described as the "Financially proper approach" to calculating prejudgment interest, except that the EEOC proposed to begin calculating interest three months into the first year of an employee's back-pay award rather than waiting until the first day of the second year of the back-pay award.

Instead of recommending that the District Court use the "Financially proper approach," the magistrate judge recommended an alternative approach. The magistrate judge did so because of its concern that the "Financially proper approach" would

> not permit an officer to actually receive his money as expeditiously [as under the approach recommended by the Magistrate]; the additional computations [necessary to follow the "Financially proper approach"] may well result in further delays in processing the officers' awards. As noted above this delay would appear to outweigh any minimal financial benefit which the officers would derive under this approach.

Ultimately, the magistrate judge "recommend[ed] that the decision [as to when prejudgment interest should begin to apply] should be that of the officers. If they desire the more financially sound approach, the magistrate judge finds that they are entitled to have prejudgment interest calculated in that manner."

On the basis of the magistrate judge's recommendation that the ultimate decisionmaking authority on the

question of when to apply prejudgment interest rested with the officers themselves, the EEOC contacted nineteen officers. Of these, sixteen indicated their desire to receive interest over the entire period of their back-pay award. Three others indicated that they would be willing to wave [sic] the interest on that period if it would help speed the process.

Nevertheless, the District Court

> order[ed] that prejudgment interest be calculated in the manner recommended by the Magistrate in his Second Proposed Findings of Fact and Recommendation. *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1079 (6th Cir.1989). Namely, prejudgment interest should be calculated from January 1, 1987, until the date of judgment. This recommendation is both sound and equitable, resulting in reasonably full compensation to the officers and expeditious resolution of their claims.

Thus the District Court appears to have misinterpreted the magistrate judge's recommendation. Whereas the magistrate judge recommended that the officers be given the right to decide when prejudgment should begin, the District Court interpreted the magistrate judge as strictly recommending that prejudgment interest begin on January 1, 1987.

Moreover, we find the decision to begin prejudgment interest only after January 1, 1987 problematic because it conflicts with the underlying goal of providing prejudgment interest, *viz.* making the officers whole by providing them the full economic value of their unlawfully held wages. Awarding prejudgment interest only beginning in

1987 does not fully reimburse employees for the value of the money they lost between the date they were mandatorily retired and January 1, 1987; rather, it gives KSP an interest-free loan for that period:

> While wage earners . . . are being unlawfully deprived of a minimum wage . . . , the noncomplying employer, however innocent, is benefitting from his violations, since he has the use of his employee's money. Unless the delinquent employer is required to restore his employee to the position he would have been in had there been no violation, via an award of liquidated damages or interest on the back wage award, the employer will thereby have been unjustly enriched by his own violation at his employee's expense.

McClanahan v. Mathews, 440 F.2d 320, 326 (6th Cir.1971). By awarding prejudgment interest at all, the District Court indicated its desire to make the troopers whole. But the troopers are not made whole by the District Court's order, for it denies the troopers interest for the years between their forced retirement and January 1, 1987. Thus, we are unable to reconcile these apparently conflicting signals. Prejudgment interest ordinarily should apply to each year an employee lost the use of her wages.[7] *See Kelly v. American Standard Inc.*, 640 F.2d 974,

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[7] We do not hold that if prejudgment interest is to be applied at all then, as a matter of law, it always must be applied to the full period of the back-pay award: the "when" of prejudgment interest is still a decision within the discretion of the District Court. We find an abuse of discretion here because the District Court misinterpreted the magistrate judge's recommendation as to when prejudgment interest should begin,

982 (9th Cir.1981) ("In assuring equitable relief under the ADEA, the loss of use of this money *during the period payments were withheld* . . . should be compensated by payment of interest.") (emphasis added). Here, the employees lost the use of their wages between the date of their forced retirement and January 1, 1987 *and* between January 1, 1987 and the date of final judgment. These employees should be compensated for both periods.

For all these reasons, we find that the District Court abused its discretion in ordering prejudgment interest to begin on January 1, 1987. On remand, the awards should be modified such that prejudgment interest begins to apply on the first day of the second year of the back-pay award, for that approach complies with our understanding of the purpose behind awarding prejudgment interest and conforms to the wishes of the officers themselves, who, under the magistrate judge's recommendation, were to choose when prejudgment interest would apply. We understand that the EEOC has computer models that would make these calculations quite easy,[8] thereby meeting the magistrate judge's and the District Court's concerns about providing expeditious relief.

KSP next argues that the District Court erred by declining to deduct amounts the troopers would have owed for taxes and by declining to deduct amounts the

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and the magistrate judge, in turn, misinterpreted EEOC's recommendation on this subject.

[8] Again, the only difference is that EEOC should begin prejudgment interest on day one of year two, not three months into the first year as it had recommended earlier.

troopers received in the form of unemployment compensation. With respect to the issue of deducting taxes that would have been owed, this Circuit has held that "[b]ackpay awards should not be reduced by the amount of income and social security taxes which would have been deducted from the wages the claimant would have received but for discrimination." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 627 (6th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984).[9] With respect to unemployment benefits, a divided Court in *Rasimas* held that they too are collateral benefits that should not be deducted from back-pay awards. *Id.* at 627-28 & n. 13. Were this matter before us on a case of first impression, we may well have decided it differently. *See Lussier v. Runyon*, 50 F.3d 1103, 1108-09 (1st Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 69, 133 L.Ed.2d 30 (1995) (describing four-to-three circuit split on whether collateral benefits should be deducted from back pay awards and siding with those appeals courts that have given trial courts discretion to deduct such benefits). While some benefits are truly collateral, and to deduct them from back pay awards would provide a windfall to the unlawfully discriminating employer, we question the applicability of this doctrine when the employer is the state and where the benefit – unemployment compensation – is administered and largely financed by the same entity, for, in such cases, the benefit does not appear to be truly collateral. Nevertheless, we

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[9] We do note, however, that, for federal income tax purposes, troopers must include the back-pay awards in gross income. *Commissioner of Internal Revenue v. Schleier*, ___ U.S. ___, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995).

are bound by this Circuit's holding in *Rasimas. United States v. Williams*, 949 F.2d 220, 221 (6th Cir.1991), *cert. denied*, 504 U.S. 958, 112 S.Ct. 2308, 119 L.Ed.2d 229 (1992) (noting that "one panel of this court is bound by the on-point published decision of an earlier panel"). Thus, the District Court did not abuse its discretion in declining to deduct unemployment compensation.

KSP also claims the District Court erred when it included overtime pay in the back-pay awards. The District Court had legal authority to include such amounts in the back-pay awards. *Rasimas*, 714 F.2d at 626 ("Sick leave, vacation pay, pension benefits and other fringe benefits the claimant would have received but for discrimination should also be awarded."). Moreover, the District Court's factual findings on the amount of compensatory time to which troopers were entitled were based on officers' testimony during individualized entitlement hearings and are not clearly erroneous. KSP also argues that the District Court erred when it chose to deduct net income, rather than gross income, from officers' back-pay awards. We disagree. As the Supreme Court noted in *NLRB v. Gullett Gin Co., Inc.*, "employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back-pay period. . . . " 340 U.S. 361, 363, 71 S.Ct. 337, 339, 95 L.Ed. 337 (1951).

Finally, KSP raises several challenges to the District Court's factual findings regarding whether the troopers mitigated their damages by looking for other work, whether the troopers could in fact have continued working after their fifty-fifth birthday, and whether some of

the troopers who retired before their fifty-fifth birthday did so in reliance on the mandatory retirement policy. We conclude that the District Court's findings are not clearly erroneous.

IV

For the reasons stated above, we AFFIRM the District Court in all respects except: we REVERSE the District Court's ruling denying EEOC's motion to toll the statute of limitations to April 3, 1978. Likewise, we REVERSE its ruling denying EEOC's motion to amend the complaint to add the names of three officers who retired after January 1, 1979. Finally, we REVERSE the District Court's ruling that prejudgment interest should begin to accrue as of January 1, 1987: prejudgment interest should begin during the back-pay period, as described herein.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

KENTUCKY STATE POLICE DEPARTMENT, ET AL. DEFENDANTS, AND BOARD OF TRUSTEES OF KENTUCKY RETIREMENT SYSTEMS, DEFENDANTS/ THIRD PARTY PLAINTIFFS

v.

REYNOLDS, ET AL., THIRD PARTY DEFENDANTS

No. 84-62

U.S. District Court, Eastern District of Kentucky

December 17, 1986

Johnny J. Butter, Acting General Counsel, Philip B. Sklover, Associate General Counsel, Joseph R. Terry, Regional Attorney, and Carolyn Howard, Memphis, Tenn., for plaintiff.

Joseph L. Farmularo, Deputy Attorney General of Kentucky, and Gerard R. Gerhard, Assistant Attorney General, for defendants.

Catesby Woodford, Lexington, Ky., and David Van Horn, Lexington, Ky., for third-party defendants Orrin V. McCarty and John R. Miller.

Full Text of Opinion

BERTELSMAN, District Judge: –

The Equal Employment Opportunity Commission (EEOC) instituted the present action under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Certain involuntarily retired state police officers are also named as parties herein. Named as

defendants were Kentucky State Police Department, Kentucky Secretary of Justice, Commissioner of the Kentucky State Police Department, Board of Trustees of Kentucky Retirement Systems, and the Commonwealth of Kentucky. The EEOC claimed that the Kentucky State Police mandatory retirement age of 55 years, prescribed by KRS 16.505(15), violated the ADEA. The defendants countered that the 55 year limit is a Bona Fide Occupational Qualification (BFOQ).

The court, having heard the testimony of both parties in a three-day bench trial, holds that age is a BFOQ for Kentucky State Police officers; and, therefore, the court enters judgment for the defendants.

The court makes the following findings of fact and conclusions of law:

The purpose of the ADEA is to encourage employers to make employment decisions based on actual qualifications rather than on the arbitrary distinction of age, *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 105 S.Ct. 2712, 37 FEP Cases 1839 (1985). In *Western Airlines v. Criswell*, 472 U.S. 400, 105 S.Ct. 2743, 37 FEP Cases 1829 (1985), the employer may make age-based distinctions where age is a BFOQ.

To prove age is a BFOQ, as the State Police did in the instant case, the employer must prove: (1) that the job qualification at issue (here, cardiovascular fitness and aerobic capacity) is "reasonably necessary" to the "essence" of its business (here, law enforcement), and (2) that the employer has "reasonable cause" to believe that substantially all people over the mandatory retirement age cannot safely perform the duties of the job or that it

would be highly impractical to deal with class members on an individual basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 12 FEP Cases 1233 (5th Cir. 1976), adopted by the Sixth Circuit in *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 28 FEP Cases 1116 (6th Cir. 1982). These are questions of fact.

While the burden is on the defendant to prove that age is a BFOQ, where, as here, the essence of defendant's business is safety-related, the employer need only show a "minimal increase in risk of harm" to establish a BFOQ defense. *Hodgson v. Greyhound Lines*, 499 F.2d 859, 863, 7 FEP Cases 817 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122, 9 FEP Cases 58 (1975).

This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed, the possibility of such occurrences is undisputed in this case.

Further, although the Kentucky State Police has not been exemplary in terms of monitoring the health of its employees, each supervisor on the Force is responsible for the fitness of his or her subordinates. As the First Circuit recently held,

> "a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification."

EEOC v. City of East Providence, 798 F.2d 524, 41 FEP Cases 906, No. 86-1026 (First Circuit, August 15, 1986). Even though, unlike the New Jersey State Police, the Department here has no inservice fitness screening, this court must agree with Federal District Judge Barry when she held, on facts almost identical to those at hand, that fitness is a BFOQ for being a police officer. *EEOC v. New Jersey State Police*, 620 F.Supp. 977, 983, 39 FEP Cases 516 (D. N.J. 1985). Many of the same witnesses testified in this case as in the New Jersey case.

While a wide range of individual physical abilities exists within any age group, and while diet and exercise programs prevent some heart disease and maintain aerobic capacity, all experts agree that there is a significant increase in coronary risk with age.

Regarding aerobic capacity, this court finds aerobic fitness to be reasonably necessary for the safe conduct of the job of a Kentucky State Police officer. Aerobic capacity is the ability of the muscles to use oxygen; it determines the strength and endurance of the body. While the requisite aerobic capacity will vary with body weight, height, and gender, and while health aerobic capacity can be maintained through rigorous fitness programs, defendant has met its burden of persuasion and proved that substantially all people over 55 lack the aerobic capacity necessary to perform as Kentucky State Police officers. Dr. Lind testified that aerobic capacity declines "almost

linearly" with age. Certainly, plaintiffs proved that individual athletes can maintain their aerobic capacity well into their 80s through continuous training and competition. Further, plaintiffs successfully demonstrated that maximum aerobic capacity, VO sub2 max., can be accurately tested. Such is not the case for cardiovascular disease.

Cardiovascular disease is often asymptomatic until a first, often fatal, coronary event. Even Dr. Pollock, the plaintiffs' own expert, found a distinct increase in coronary risk with age when he studied the Dallas area police force. Dr. Antlitz testified to "a definite relationship between age and coronary artery obstruction or disease." He further testified that, according to a 1950 study, "somewhere around 55 they have 70 plus -- 75 percent obstruction of one or more coronary arteries." He noted that the number of deaths due to ischemic heart disease skyrockets as people reach their late 50s. Indeed, one expert testified that, by age 55, almost 80% of the population has at least a 50% obstruction of at least one coronary artery. Although this is not as important for sedentary jobs, this coronary disease might well lead to a coronary incident during the times of stress which the State Police encounter.

Further, although the use of various tests in combination might identify certain high-risk individuals, the court finds that non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age. There is no test that will decisively determine that a specific individual does not have significant coronary disease.

Finally, and significantly, the court finds the recent amendment to the ADEA to be indicative of congressional policy in this area. While eliminating the abilities of most employers to institute mandatory retirement plans for employees of any age, the Amendment specifically exempts law enforcement and fire fighting personnel from coverage.

> "SEC. 3. EMPLOYMENT AS FIREFIGHTING OR LAW ENFORCEMENT OFFICER.
>
> (a) GENERAL RULE. -- Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection: '(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken
>
> '(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> '(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.
>
> (b) TERMINATION PROVISION. -- The amendment made by subsection (a) of this section is repealed December 31, 1933."
>
> "SEC. 7. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

> (b) EFFECT ON EXISTING CAUSES OF ACTION. -- The Amendments made by sections 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of the 1967 as in effect before January 1, 1987."

H.R. 4154, 99th Cong. 2d Sess. 144 Cong. Rec. -- House, H 11280 (Oct. 17, 1986). There the House approved the Senate version of H.R. 4154. The bill has yet to be printed in its final form.

The Federal Government has always maintained a mandatory retirement age for Federal law enforcement officers. Now the Congress has expanded that power to state and local governments, at least for another seven years. That expansion specifically was intended to prevent suits like the instant action and to defer to state legislation to determine what is in the best interest of the public, pending a congressionally mandated EEOC/Secretary of Labor study to determine whether physical and mental fitness tests "are valid measurements of the ability and competency of police officers and firefighters." (Section 5 of the Amendments to the ADEA). Although the bill does not take effect until January, allowing the named plaintiffs a recovery here would be tantamount to a windfall. If we held otherwise, the individual plaintiffs, involuntarily retired officers, could return to work tomorrow and retire the day after tomorrow with substantial back pay and increased retirement. The court believes that the recent amendment is indicative of a legislative intent that this should not be permitted.

As we have said, it was a very close question under the ADEA, as it existed when this action was filed,

whether a mandatory retirement age for law enforcement officers was a BFOQ. The ADEA was at least philosophically inconsistent with the Congressional policy of having a mandatory retirement age of 55 for federal officers, although the Supreme Court held that Congress had a right to be inconsistent in this area. *Johnson v. Mayor and City Council of Baltimore,* 472 U.S. 353, 105 S.Ct. 2717, 37 FEP Cases 1839 (1985).

Now Congress while expanding the scope of the Act as to almost everyone else has provided seven more years to study the problem of mandatory retirement for law enforcement personnel. Despite the saving clause for existing causes of action, the court regards this as being reflective of pre-existing legislative intent to regard mandatory retirement for police officers as BFOQ until more returns are in. Although subsequent amendments to a statute "must be weighed with extreme care," they may be utilized "in the search for legislative intent." *Andrus v. Shell Oil Co.,* 446 U.S. 657, 666, n.8 (1980); 73 Am.Jur.2d § 178.

For all the foregoing reasons, the court holds that the Kentucky State Police mandatory retirement age is a BFOQ. A separate Judgment will enter dismissing the complaint herein.

Judgment

Pursuant to the Opinion entered concurrently herewith, the court being advised,

IT IS ORDERED AND ADJUDGED that the Complaint herein and the claims of the individual police

officers be, and they are, hereby DISMISSED, with prejudice, at the cost of the plaintiff.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

KENTUCKY STATE POLICE DEPARTMENT, et al., Defendants.

Civ. A. No. 84-62.

United States District Court, E.D. Kentucky, Frankfort Division.

May 23, 1994.

George C. Bradley, Joseph Ray Terry, Terry Beck, E.E.O.C., Memphis, TN, James R. Neely, Philip B. Sklover, Charles A. Shanor, E.E.O.C., Washington, DC, for plaintiff E.E.O.C.

Frank E. Haddad, Jr., Louisville, KY, for defendants State Police Dept., KY, Secretary of the KY Justice Cabinet, Com'r of KY State Police Dept.

Robert W. Kellerman, William E. Johnson, Stoll, Keenon & Park, Frankfort, KY, for defendant KY Retirement Systems, Bd. of Trustees.

James M. Ringo, Atty. Gen. Office, Frankfort, KY, for defendant Com. of KY.

Dave Whalin, Landrum & Shouse, Louisville, KY, for third-party defendant Bettye Anne Sherrard, Administratrix of Estate of Billy Lee Sherrard.

William H. Vanherp, Covington, KY, for third-party defendant Arthur B. Emmons, and claimants Harold Kinman, Gilbert Baxter and Louise Bailey (Estate of Troy Bailey).

James M. Baker, Frankfort, KY, for third-party defendants Rose Mayes, Gail McCarty, William Henry Starks.

David Van Horn, Lexington, KY, for third-party defendant John R. Miller.

William D. Kirkland, Sarah M. Jackson, McBrayer, McGinnis, Leslie & Kirkland, Frankfort, KY, for third-party defendant Winston R. Kuykendall.

George F. Rabe, Lexington, KY, for third-party defendant William G. Mullins.

Robert G. Higgins, Dept. of Law, Frankfort, KY, for claimant Freida Higgins.

Richard Clay, Clay & Clay, Danville, KY, for claimant Tyndale Brown.

Betty Ann Sherard, Landrum & Shouse, Louisville, KY.

Carolyn Wheeler, Associate Gen. Counsel, E.E.O.C., Office of Appellate Services, Washington, DC.

Lynne Schroering, Asst. Atty. Gen., Frankfort, KY.

Ben P. Coomes, Coomes, Coomes & Coomes, New Castle, KY.

JUDGMENT

BERTELSMAN, Chief Judge.

For the reasons stated in Orders previously entered by this Court,

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered on behalf of the plaintiff, Equal Employment Opportunity Commission (Commission), and the Defendant, Commissioner of the Kentucky State Police

Department, Board of Trustees of Kentucky Retirement Systems (Board) on its cross claim against the defendant, Kentucky State Police Department (KSPD) and the Board with regard to the claims of those officers who were mandatorily retired between January 1, 1979 and October 19, 1981 as follows:

I. KSPD shall pay the sum of $6,530,858.50 to the Board no later than the 10th day of the month following the issuance of this order.

II. The officers listed below are AWARDED back pay and prejudgment interest as set out below:

Name	Back Pay	Prejudgment Interest	Total
Larry Boucher	$ 3,540.79	$ 1,211.84	$ 4,752.63
Joseph Bradberry	$ 85,628.25	$29,306.30	$114,934.55
Thomas Browne	$ 62,556.61	$21,410.03	$ 83,966.64
Ralph Byrum	$ 33,415.68	$11,436.53	$ 44,852.21
William Campbell	$ 85,449.64	$29,245.17	$114,694.81
William Clark	$ 0.00	$ 0.00	$ 0.00
Logan Deaton, Jr.	$109,472.87	$37,467.14	$146,940.01
Arthur Emmons	$ 12,770.04	$ 4,370.55	$ 17,140.59
Joe Ginn	$ 22,576.86	$ 7,726.94	$ 30,303.80
George Hall, Jr.	$ 56,583.58	$19,365.75	$ 75,949.33
Carroll F. Hardin	$ 33,924.57	$11,610.70	$ 45,535.27
James R. Hendrickson	$ 9,057.79	$ 3,100.03	$ 12,157.82
James B. Jones	$ 58,097.14	$19,883.77	$ 77,980.91
Winston Kuykendall	$163,959.78	$56,115.30	$220,075.08
Delmar Laferty	$ 26,052.56	$ 8,916.50	$ 34,969.06
Willis G. Lawson	$ 76,147.66	$26,061.57	$102,209.23
James Mayes	$ 89,114.25	$30,499.39	$119,613.64
Orrin McCarty	$ 35,312.52	$12,085.72	$ 47,398.24
Ray F. McCarty	$158,556.73	$54,266.11	$212,822.84
George F. Meyer, Jr.	$135,920.66	$46,518.90	$182,439.56
John R. Miller	$ 2,182.66	$ 747.02	$ 2,929.68
Rufus Moberly	$ 42,059.90	$14,395.02	$ 56,454.92
William Mullins	$145,443.51	$49,778.10	$195,221.61
William O. Newman	$ 94,475.02	$32,334.11	$126,809.13
Harold Pierce	$103,288.78	$35,350.63	$138,639.41
Arthur L. Poole	$ 0.00	$ 0.00	$ 0.00
Leo Reynolds	$162,716.62	$55,689.83	$218,406.45
Algin Roberts	$169,004.27	$57,841.78	$226,846.05
Billy L. Sherrard	$ 23,766.06	$ 8,133.94	$ 31,900.00
Thomas Simpson	$ 45,713.67	$15,645.52	$ 61,359.19
Paul Smith	$ 23,392.45	$ 8,006.08	$ 31,398.53
Guy Turner	$151,306.92	$51,784.86	$203,091.78
William S. Underwood	$ 25,349.19	$ 8,675.77	$ 34,024.96
Fred Watson	$ 14.50	$ 4.96	$ 19.46
Edward L. Wright	$111,477.10	$38,153.08	$149,630.18

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III. The officers listed below are AWARDED additional pension payments and prejudgment interest as set out below:

Name	Back Pension	Prejudgment Interest
Larry Boucher	$ 18,639.76	$ 0.00
Joseph Bradberry	$107,770.93	$ 9,585.99
Thomas Browne	$ 63,045.99	$ 3,923.05
Ralph Byrum	$244,295.19	$19,285.41
William Campbell	$243,833.29	$35,786.95
William Clark	$130,540.61	$ 8,672.18
Logan Deaton, Jr.	$111,674.86	$14,238.42
Arthur Emmons	$ 89,554.95	$ 6,440.27
Joe Ginn	$149,265.49	$14,997.28
George Hall, Jr.	$216,220.02	$22,276.39
Carroll F. Hardin	$117,143.62	$16,519.64
James R. Hendrickson	$ 82,365.60	$11,625.74
James B. Jones	$ 55,378.35	$ 7,834.08
Winston Kuykendall	$105,392.19	$14,835.72
Delmar Laferty	$143,088.55	$18,834.78
Willis G. Lawson	$ 83,907.80	$11,832.12
James Mayes	$188,228.74	$18,291.70
Orrin McCarty	$121,303.27	$10,424.78
Ray F. McCarty	$140,514.33	$19,745.99
George F. Meyer, Jr.	$123,015.23	$16,657.55
John R. Miller	$104,413.43	$ 5,088.71
Rufus Moberly	$104,521.80	$14,714.04
William Mullins	$162,801.39	$22,852.50
William O. Newman	$113,764.12	$16,006.22
Harold Pierce	$114,410.54	$10,436.64
Arthur L. Poole	$102,557.34	$11,681.19
Leo Reynolds	$122,068.25	$17,167.13
Algin Roberts	$143,004.96	$20,084.95
Billy L. Sherrard	$ 63,844.03	$ 9,697.73
Thomas Simpson	$270,525.52	$29,103.15
Paul Smith	$ 99,923.46	$ 6,901.73
Guy Turner	$118,153.29	$16,629.01
William S. Underwood	$163,743.36	$15,499.96
Fred Watson	$122,431.12	$17,227.07
Edward L. Wright	$ 94,492.76	$13,302.72

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IV. The amount AWARDED to the officers listed in paragraph III under the heading Back Pension is to be paid by the Board directly to each officer no later than the 15th day of the second month following the issuance of this order. Said payments are conditioned upon KSPD having made the payment in full which is set out in Paragraph I of this order. The Board shall determine whether or not it owes any officer additional back pension as a result of any delays in the implementation of this order. If the Board determines that additional payments are owed it shall calculate the amount owed each officer and either increase the amount provided for in this order or make a supplemental payment within 60 days of the initial payment. The Board shall provide the Commission with a copy of its calculations as to additional amounts owed each officer in a manner similar to that which the Board provided the Commission the information developed in preparation of this order.

V. The amount AWARDED to the officers listed below is to be paid directly to each officer no later than the 10th day of the month following the issuance of this order.

The amount listed below consists of the total amount in Paragraph II above and the prejudgment interest listed in paragraph III above less the amount of employee contributions due from each officer to the Board.

Name	Total from Paragraph II	Prejudgment Interest from Paragraph III	Total
Larry Boucher	$ 4,752.63	$ 0.00	$ 4,752.63
Joseph Bradberry	$114,934.55	$ 9,585.99	$124,520.54
Thomas Browne	$ 83,966.64	$ 3,923.05	$ 87,889.69
Ralph Byrum	$ 44,852.21	$19,285.41	$ 64,137.62
William Campbell	$114,694.81	$35,786.95	$150,481.76
William Clark	$ 0.00	$ 8,672.18	$ 8,672.18
Logan Deaton, Jr.	$146,940.01	$14,238.42	$161,178.43
Arthur Emmons	$ 17,140.59	$ 6,440.27	$ 23,580.86
Joe Ginn	$ 30,303.80	$14,997.28	$ 45,301.08
George Hall, Jr.	$ 75,949.33	$22,276.39	$ 98,225.72
Carroll F. Hardin	$ 45,535.27	$16,519.64	$ 62,054.91
James Hendrickson	$ 12,157.82	$11,625.74	$ 23,783.56
James B. Jones	$ 77,980.91	$ 7,834.08	$85,814.99
Winston Kuykendall	$220,075.08	$14,835.72	$234,910.80
Delmar Laferty	$ 34,969.06	$18,834.78	$ 53,803.84
Willis G. Lawson	$102,209.23	$11,832.12	$114,041.35
James Mayes	$119,613.64	$18,291.70	$137,905.34
Orrin McCarty	$ 47,398.24	$10,424.78	$ 57,823.02
Ray F. McCarty	$212,822.84	$19,745.99	$232,568.83
George Meyer, Jr.	$182,439.56	$16,657.55	$199,097.11
John R. Miller	$ 2,929.68	$ 5,088.71	$ 8,018.39
Rufus Moberly	$ 56,454.92	$14,714.04	$ 71,168.96
William Mullins	$195,221.61	$22,852.50	$218,074.11
William O. Newman	$126,809.13	$16,006.22	$142,815.35
Harold Pierce	$138,639.41	$10,436.64	$149,076.05
Arthur L. Poole	$ 0.00	$11,681.19	$11,681.19
Leo Reynolds	$218,406.45	$17,167.13	$235,573.58
Algin Roberts	$226,846.05	$20,084.95	$246,931.00
Billy L. Sherrard	$ 31,900.00	$ 9,697.73	$ 41,597.73
Thomas Simpson	$ 61,359.19	$29,103.15	$ 90,462.34
Paul Smith	$ 31,398.53	$ 6,901.73	$ 38,300.26
Guy Turner	$203,091.78	$16,629.01	$219,720.79
William Underwood	$ 34,024.96	$15,499.96	$ 49,524.92
Fred Watson	$ 19.46	$17,227.07	$ 17,246.53
Edward L. Wright	$149,630.18	$13,302.72	$162,932.90

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VI. The following officers listed below are to be paid the altered pension set out in paragraph VII only on condition that they pay the following additional sums to the Board no later than the 18th of the month following the issuance of this order. If KSPD has not paid the Board by the 10th day of the month following the issuance of this order, the Board shall notify the Commission which shall notify each of the officers identified in this paragraph by certified mail that they should not send to the Board the check provided for in this paragraph. The Board shall notify the Commission by regular mail and the officers in question by certified mail if the Board determines that the officers owe additional sums to the Board as a result of any delays in this order.

Name	Amount owed Board
Larry Boucher	$18,639.76

VII. The Board is ordered to increase the pension of each officer as set out below beginning two months following the issuance of this order. Payment of the increased pension is dependent upon the Board receiving the amounts owed it by KSPD by the date indicated in paragraph I. Payment of the increased pension as to the officers listed in paragraph VI is dependent upon the Board receiving the amounts owed it by the officers listed in paragraph VI by the date indicated.

Name	Amount of new monthly pension	Type option Selected
Larry Boucher	$2,004.95	Surv. 100%
Joseph Bradberry	$1,962.16	Pop-Up
Thomas R. Browne	$2,032.65	Surv. 100%
Ralph Byrum	$3,629.14	10 Yrs. Cert.
William B. Clark	$2,974.24	Life W/10 Yrs.
William Campbell	$5,800.52	10 Yrs. Cert.
Logan Deaton, Jr.	$2,289.93	Surv. 100%
Arthur Emmons	$2,538.94	Pop-Up
Joe Ginn	$2,428.31	Pop-Up
George Hall, Jr.	$3,499.27	10 Yrs. Cert.
Carroll F. Hardin	$3,586.11	Surv. 100%
James R. Hendrickson	$2,375.31	Pop-Up
James B. Jones	$2,319.90	Life W/20 Yrs.
Winston Kuykendall	$3,146.16	Surv. 50%
Delmar Laferty	$2,467.81	Surv. 100%
Willis G. Lawson	$2,754.21	Surv. 50%
James Mayes	$3,586.64	Life W/20 Yrs.
Orrin McCarty	$2,669.27	Surv. 100%
Ray McCarty	$4,013.93	Surv. 50%
George Meyer	$2,885.49	Pop-Up
John R. Miller	$3,059.75	Surv. 50%
Rufus Moberly	$3,568.32	Pop-Up
William G. Mullins	$4,363.73	Basic
William O. Newman	$3,635.44	Pop-Up
Harold Pierce	$3,581.29	Surv. 100%
Arthur L. Poole	$2,374.78	Surv. 100%
Leo Reynolds	$3,299.64	Surv. 66 2/3%
Algin Roberts	$3,721.26	Surv. 66 2/3%
Billy L. Sherrard	$2,768.78	Surv. 100%
Thomas Simpson	$4,227.86	10 Yrs. Cert.
Paul Smith	$3,647.70	Pop-Up
Guy Turner	$2,667.82	Surv. 50%
William S. Underwood	$2,852.62	Pop-Up
Fred Watson	$3,431.81	Surv. 50%
Edward L. Wright	$3,478.29	Life W/20 Yrs.

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VIII. The following officers or beneficiaries listed below are to be paid the altered pension set out in paragraph VII and the Back Pension set out in paragraph III only on condition that they purchase military leave by paying the following additional sums to the Board no later than the 18th of the month following the issuance of this order. If KSPD has not paid the Board by the 10th day of the month following the issuance of this order, the Board shall notify the Commission, which shall in turn notify each of the officers identified in this paragraph by certified mail that they should not send to the Board the check provided for in this paragraph. The Board shall notify the Commission by regular mail and the officers in question by certified mail if the Board determines that the officers owe different sums to the Board as a result of any delays in the implementation of this order. Likewise, the Board shall notify the Commission and the officers in question if it determines that the amount owed by any officer changes as a result of certification of military service.

Name	Amount owed Board for Military credit
Larry Boucher	$ 9,597.94
Ralph Byrum	$11,910.34
William B. Clark	$ 6,338.54
Logan Deaton, Jr.	$ 7,460.01
Joe Ginn	$ 8,554.74
Carroll F. Hardin	$ 7,289.54

James R. Hendrickson	$ 4,414.50
Delmar Laferty	$ 7,961.17
Orrin McCarty	$ 4,924.02
Ray McCarty	$ 3,319.63
James Mayes	$ 6,120.55
John R. Miller	$ 6,479.01
Arthur L. Poole	$ 9,012.14
Leo Reynolds	$13,611.17
Algin Roberts	$17,097.52
B.L. Sherrard	$15,069.07
Guy Turner	$ 7,759.64

IX. The EEOC is AWARDED its statutory costs under 28 U.S.C. Section 1920 and its costs incurred during pretrial discovery in an amount to be determined after submission of an affidavit by its counsel within 30 days after time for any appeal has expired.

X. The individual plaintiffs who have retained private counsel shall recover their costs herein, including reasonable attorney's fees, from the defendant Kentucky State Police. 29 U.S.C. 626(b), 29 U.S.C. 216(b). Private counsel are referred to Joint Local Rule 14 for the United States District Courts of the Eastern and Western Districts of Kentucky.

XI. This is a final judgment as to all officers mandatorily retired between January 1, 1979 and October 19, 1981.

ORDER

This matter is before the court upon (1) the tendered judgment as ordered and (2) Kentucky Retirement System's motions for an order holding that, unlike the other claimants, the three widow claimants are prohibited from purchasing military credit as part of their recovery under KRS 61.555(6) because their husbands died prior to the effective date of that section, and the court being advised,

IT IS ORDERED AS FOLLOWS:

1. That, for the reasons stated by plaintiff and claimant Sherrard in their memoranda in opposition and in paragraph 6 of this court's prior order dated March 15, 1994, the motions (Docs. ## 465 & 466) be, and they are, hereby DENIED;

2. That the Judgment for the claims of those officers who were mandatorily retired between January 1, 1979 and October 19, 1981, be entered concurrently herewith;

3. That Item XI of the Judgment entered April 5, 1993 for the claims of those officers who were mandatorily retired between October 19, 1981 and December 31, 1986 (Doc. # 335) be, and it is, hereby amended to read "This is a final judgment as to all officers mandatorily retired between 10/19/81 and 12/31/86."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CIVIL ACTION NO. 84-62

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

VS.

KENTUCKY STATE POLICE DEPARTMENT, ET AL — DEFENDANTS

JUDGMENT

(Filed Apr. 5, 1993)

For the reasons stated in Orders previously entered by this court,

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered on behalf of the plaintiff, Equal Employment Opportunity Commission (Commission), and the Defendant, Commissioner of the Kentucky State Police Department, Board of Trustees of Kentucky Retirement Systems (Board) on its cross claim against the defendant, Kentucky State Police Department (KSPD), and the Board with regard to the claims of those officers who were mandatorily retired between October 19, 1981 and December 31, 1986 as follows:

I. KSPD shall pay the sum of $3,659,941.04 to the Board no later than the 10th day of the month following the issuance of this order.

II. The officers listed below are AWARDED back pay and prejudgment interest as set out below:

Name	Back Pay	Prejudgment Interest	Total
Norman Addington	$ 84,457.62	$ 23,113.53	$107,571.15
George Arflack	$ 71,247.51	$ 19,498.31	$ 90,745.82
Ernest Bivens	$ 27,401.62	$ 7,499.00	$ 34,900.62
William Bradley	$ 44,930.23	$ 12,296.06	$ 57,226.29
Donald Burns	$ 30,346.41	$ 8,304.91	$ 38,651.32
Earnest Carroll	$ 13,695.56	$ 3,748.07	$ 17,443.63
Ralph Cline	$ 70,726.04	$ 19,355.60	$ 90,081.64
Arthur Conkwright	$ 42,772.14	$ 11,705.46	$ 54,477.60
Iris Crawford	$ 26,868.04	$ 7,352.98	$ 34,221.02
James Davis	$ 5,987.09	$ 1,638.49	$ 7,625.58
William Feltner	$ 31,395.70	$ 8,592.07	$ 39,987.77
Russell Ferguson	$ 27,507.58	$ 7,528.00	$ 35,035.58
Ellis Flora	$ 82,824.38	$ 22,666.56	$105,490.94
Paul Fraim	$105,817.84	$ 28,959.18	$134,777.02
Donald Goble	$ 17,640.40	$ 4,827.65	$ 22,468.05
Harold Haddix	$ 29,793.04	$ 8,153.47	$ 37,946.51
Leslie Higgins	$ 69,127.34	$ 18,918.09	$ 88,045.43
Fredrick Hulsey	$102,530.86	$ 28,059.63	$130,590.49
John Humkey	$ 57,108.78	$ 15,628.97	$ 72,737.75
Samuel King	$121,073.62	$ 33,134.23	$154,207.85
Donald Laferty	$ 53,959.65	$ 14,767.14	$ 68,726.79
Billy Lloyd	$ 11,124.28	$ 2,951.48	$ 14,075.76
Campbell Lockhart	$ 67,026.63	$ 17,783.44	$ 84,810.07
Jay McReynolds	$102,246.26	$ 27,127.88	$129,374.14
Virgil Miller	$ 14,333.58	$ 3,802.97	$ 18,136.55
Richard Norsworthy	$ 11,574.78	$ 3,071.01	$ 14,645.79
Morris Osborne	$ 50,415.21	$ 13,376.11	$ 63,791.32
James Powell	$ 35,938.15	$ 9,353.07	$ 45,291.22
Roy Ragland	$ 88,755.80	$ 23,548.60	$112,304.40
Leonard Richardson	$ 26,393.78	$ 7,002.77	$ 33,396.55
John Robey	$ 23,322.42	$ 6,187.88	$ 29,510.30
Kenneth Russell	$ 29,530.60	$ 7,835.03	$ 37,365.63
Walter R. Sims	$ 70,869.82	$ 18,803.11	$ 89,672.93
Chester Spurrier	$ 35,395.35	$ 9,391.06	$ 44,786.41
William Starks	$ 19,970.83	$ 5,298.64	$ 25,269.47
Kenneth Vanhoose	$ 49,821.87	$ 13,218.69	$ 63,040.56
Oakley Watkins	$ 9,938.40	$ 2,636.85	$ 12,575.25
Everett Wilcox	$ 24,255.76	$ 6,435.51	$ 30,691.27
William Williamson	$ 11,954.41	$ 3,171.73	$ 15,126.14

III. The officers listed below are AWARDED additional pension payment and prejudgment interest as set out below:

Name	Back Pension	Prejudgment Interest
Norman Addington	$ 55,016.47	$ 6,572.21
George Arflack	$ 89,990.57	$ 10,893.86
Ernest Bivens	$ 57,875.54	$ 6,971.59
William Bradley	$ 4,514.51	$ 00.00
Donald Burns	$ 22,144.77	$ 2,752.21
Earnest Carroll	$ 15,129.71	$ 1,822.49
Ralph Cline	$ 54,357.22	$ 6,547.75
Arthur Conkwright	$ 10,359.72	$ 630.44
Iris Crawford	$ 14,684.05	$ 1,768.83
Russell Ferguson	$ 18,360.86	$ 2,211.72
Ellis Flora	$ 56,252.99	$ 6,714.72
Paul Fraim	$ 42,432.07	$ 5,111.30
Donald Goble	$ 50,955.72	$ 6,138.01
Harold Haddix	$ 24,950.61	$ 3,045.90
Leslie Higgins	$ 46,268.72	$ 5,573.46
Fredrick Hulsey	$ 51,801.64	$ 6,239.94
John Humkey	$ 23,849.33	$ 2,872.84
Samuel King	$188,127.20	$ 22,661.51
Donald Laferty	$ 42,388.57	$ 5,106.07
Billy Lloyd	$ 5,265.99	$ 634.31
Campbell Lockhart	$ 61,200.47	$ 7,372.13
Jay McReynolds	$ 73,832.59	$ 8,893.75
Virgil Miller	$ 4,268.01	$ 00.00
Richard Norsworthy	$ 7,393.74	$ 805.78
Morris L. Osborne	$124,226.34	$ 10,321.37
Roy Ragland	$ 52,693.05	$ 6,347.32
Leonard Richardson	$ 19,084.57	$ 2,298.90
John Robey	$ 12,567.27	$ 1,513.85
Walter R. Sims	$ 72,926.13	$ 8,784.57
Chester Spurrier	$ 7,122.01	$ 00.00
William H. Starks	$ 9,280.95	$ 1,117.99
Kenneth Vanhoose	$ 24,081.45	$ 2,900.00
Oakley B. Watkins	$ 13,546.86	$ 2,600.23
Everett Wilcox	$ 11,376.25	$ 1,358.87

IV. The amount AWARDED to the officers listed in paragraph III under the heading Back Pension is to be paid by the Board directly to each officer no later than the 15th day of the second month following the issuance of this order. Said payments are conditioned upon KSPD having made the payment in full which is set out in Paragraph I of this order. The Board shall determine whether or not it owes any officer additional back pension as a result of any delays in the implementation of this order. If the Board determines that additional payments are owed it shall calculate the amount owed each officer and either increase the amount provided for in this order or make a supplemental payment within 60 days of the initial payment. The Board shall provide the Commission with a copy of its calculations as to additional amounts owed each officer in a manner similar to that which the Board provided the Commission the information developed in preparation of this order.

V. The amount AWARDED to the officers listed below is to be paid directly to each officer no later than the 10th day of the month following the issuance of this order.

The amount listed below consists of the total amount in Paragraph II above and the prejudgment interest listed in paragraph III above less the amount of employee contributions due from each officer to the Board.

Name	Total from Paragraph II	Prejudgment Interest from Paragraph III	Less employee Contributions Due	Total
Norman Addington	$107,571.15	$ 6,572.21	$ 10,736.55	$103,406.81
George Arflack	$ 90,745.82	$ 10,893.86	$ 14,318.29	$ 87,321.39
Ernest Bivens	$ 34,900.62	$ 6,971.59	$ 9,447.62	$ 32,424.59
William Bradley	$ 57,226.29	$ 00.00	$ 15,206.96	$ 42,019.33
Donald Burns	$ 38,651.32	$ 2,752.21	$ 4,902.20	$ 36,501.33
Earnest Carroll	$ 17,443.63	$ 1,822.49	$ 4,051.11	$ 15,215.01
Ralph Cline	$ 90,081.64	$ 6,547.75	$ 9,318.12	$ 87,311.27
Arthur Conkwright	$ 54,477.60	$ 630.44	$ 6,082.16	$ 49,025.88
Iris Crawford	$ 34,221.02	$ 1,768.83	$ 3,715.21	$ 32,274.64
James Davis	$ 7,625.58	$ 00.00	$ 954.62	$ 6,670.96
William Feltner	$ 39,987.77	$ 00.00	$ 4,249.42	$ 35,738.35
Russell Ferguson	$ 35,035.58	$ 2,211.72	$ 4,531.35	$ 32,715.95
Ellis Flora	$105,490.94	$ 6,714.72	$ 9,898.70	$102,306.96
Paul Fraim	$134,777.02	$ 5,111.30	$ 11,277.98	$128,610.34
Donald Goble	$ 22,468.05	$ 6,138.01	$ 10,736.55	$ 17,869.51
Harold Haddix	$ 37,946.51	$ 3,045.90	$ 5,381.12	$ 35,611.29
Leslie Higgins	$ 88,045.43	$ 5,573.46	$ 8,708.07	$ 84,910.82
Fredrick Hulsey	$130,590.49	$ 6,239.94	$ 10,151.15	$126,679.28
John Humkey	$ 72,737.75	$ 2,872.84	$ 6,335.84	$ 69,274.75
Samuel King	$154,207.85	$ 22,661.51	$ 9,260.17	$167,609.19
Donald Laferty	$ 68,726.79	$ 5,106.07	$ 8,979.32	$ 64,853.54
Billy Lloyd	$ 14,075.76	$ 634.31	$ 1,457.62	$ 13,252.45
Campbell Lockhart	$ 84,810.07	$ 7,372.13	$ 10,514.22	$ 81,667.98
Jay McReynolds	$129,374.14	$ 8,893.75	$ 11,646.95	$126,620.94
Virgil Miller	$ 18,136.55	$ 00.00	$ 14,090.16	$ 4,046.39
Richard Norsworthy	$ 14,645.79	$ 805.44	$ 2,186.36	$ 13,264.87
Morris Osborne	$ 63,791.32	$ 10,321.37	$ 12,965.68	$ 61,147.01
James Powell	$ 45,291.22	$ 00.00	$ 8,684.13	$ 36,607.09
Roy Ragland	$112,304.40	$ 6,347.32	$ 12,651.31	$106,000.41
Leonard Richardson	$ 33,396.55	$ 2,298.90	$ 4,167.46	$ 31,527.99
John Robey	$ 29,510.30	$ 1,513.85	$ 4,398.55	$ 26,625.60
Kenneth Russell	$ 37,365.63	$ 00.00	$ 13,925.17	$ 23,440.46
Walter R. Sims	$ 89,672.93	$ 8,784.57	$ 12,863.20	$ 85,594.30
Chester Spurrier	$ 44,786.41	$ 00.00	$ 6,083.14	$ 38,703.27
William Starks	$ 25,269.47	$ 1,117.99	$ 2,305.58	$ 24,081.88
Kenneth Vanhoose	$ 63,040.56	$ 2,900.80	$ 6,052.41	$ 59,888.95
Oakley Watkins	$ 12,575.25	$ 2,600.23	$ 1,476.65	$ 13,698.83
Everett Wilcox	$ 30,691.27	$ 1,358.87	$ 3,460.57	$ 28,589.57
William Williamson	$ 15,126.14	$ 00.00	$ 2,126.52	$ 12,999.62

VI. The following officers listed below are to be paid the altered pension set out in paragraph VII only on condition that they pay the following additional sums to the Board no later than the 18th of the month following the issuance of this order. If KSPD has not paid the Board by the 10th day of the month following the issuance of this order, the Board shall notify the Commission which shall notify each of the officers identified in this paragraph by certified mail that they should not send to the Board the check provided for in this paragraph. The Board shall notify the Commission by regular mail and the officers in question by certified mail if the Board determines that the officers owe additional sums to the Board as a result of any delays in this order.

Name	Amount owed Board
James Davis	$26,884.44
William Feltner	$ 3,390.35
James Powell	$31,179.22
Kenneth Russell	$ 6,110.47
William Williamson	$ 8,708.50

VII. The Board is ordered to increase the pension of each officer as set out below beginning two months following the issuance of this order. Payment of the increased pension is dependent upon the Board receiving the amounts owed it by KSPD by the date indicated in paragraph I. Payment of the increased pension as to the officers listed in paragraph VI is dependent upon the Board receiving the amounts owed it by the officers listed in paragraph VI by the date indicated.

Name	Amount of new Monthly pension	Type option Selected
Norman Addington	$2,233.02	Soc. Sec. with Surv.
George Arflack	$3,335.01	Basic
Ernest Bivens	$2,545.08	Surv. – 50%
William Bradley	$3,964.43	Surv. – 66²/₃%
Donald Burns	$3,061.06	Surv. – 50%
Earnest Carroll	$2,778.19	Surv. – 50%
Ralph Cline	$3,664.14	Surv. – 100%
Arthur Conkwright	$3,370.89	Pop-Up
Iris Crawford	$2,713.71	Surv. – 66²/₃%
James Davis	$2,379.36	Surv. – 100%
William Feltner	$2,132.54	Surv. – 100%
Russell Ferguson	$2,769.07	Surv. – 100%
Ellis Flora	$2,325.00	Soc. Sec. with Surv.
Paul Fraim	$2,268.21	Pop-Up
Donald Goble	$2,350.98	Surv. – 50%
Harold Haddix	$2,633.48	Soc. Sec. with Surv.
Leslie Higgins	$2,787.26	Surv. – 50%
Fredrick Hulsey	$2,901.65	Pop-Up
John Humkey	$2,508.15	Pop-Up
Samuel King	Deferred	Surv. – 100%
Donald Laferty	$2,230.43	Surv. – 50%
Billy Lloyd	$2,486.42	Pop-Up
Campbell Lockhart	$2,961.15	Surv. – 50%
Jay McReynolds	$3,580.68	Surv. – 66²/₃%
Virgil Miller	$2,780.08	Surv. – 100%
Richard Norsworthy	$4,370.13	Life W/10 Yrs.
Morris Osborne	$4,307.16	Ten Year Cert.
James Powell	$2,493.69	Surv. – 50%
Roy Ragland	$3,140.56	Surv. – 100%
Leonard Richardson	$2,768.90	Surv. – 100%
John Robey	$3,227.79	Pop-Up
Kenneth Russell	$3,984.82	Surv. – 66²/₃%
Walter R. Sims	$3,514.34	Surv. – 50%
Chester Spurrier	$2,210.24	Pop-Up
William Starks	$2,613.81	Basic
Kenneth Vanhoose	$3,092.36	Surv. – 100%
	$ 307.25 (KERS)	
Oakley Watkins	$2,588.66	Surv. – 100%
Everett Wilcox	$2,223.66	Soc. Sec. With Surv.
William Williamson	$2,856.29	Surv. – 66²/₃%

VIII. Any officer qualifying for military service credit under KRS 61.555 shall be permitted to purchase such credits by paying a single payment of 50% of the total cost of the service pursuant to KRS 61.555(6) within thirty days of the date of entry of this order.

IX. The EEOC is AWARDED its statutory costs under 28 U.S.C. Section 1920 and its costs incurred during pretrial discovery in an amount to be determined after submission of an affidavit by its counsel within 30 days after time for any appeal has expired.

X. The individual plaintiffs who have retained private counsel shall recover their costs herein, including reasonable attorney's fees, from the defendant Kentucky State Police. 29 U.S.C. 626(b), 29 U.S.C. 216(b). Private counsel are referred to Joint Local Rule 14 for the United States District Court of the Eastern and Western Districts of Kentucky.

XI. This is a final judgment as to all officers mandatorily retired between October 19, 1981 and December 31, 1986.

This 2d day of April, 1993.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN,
CHIEF JUDGE

DATE OF ENTRY AND DISTRIBUTION:

Charles Shanor/Philip Sklover
George Bradley/Joseph Terry/Lawrence Kamenetzky
Robert W. Kellerman/William E. Johnson
James M. Baker
Robert G. Higgins
Frank E. Haddad, Jr.
Lynne Schroering
William H. VanHerp
George F. Rabe
David Van Horn
William D. Kirkland/Sarah Jackson
David Whalin
Magistrate Judge James P. Cook
4/7/93 sm

29 U.S.C. § 622. Education and research program; recommendation to Congress

HISTORICAL AND STATUTORY NOTES

Study and Proposed Guidelines Relating to Police Officers and Firefighters

Pub. 2. 99-592, § 5, Oct. 31, 1986, 100 Stat. 3343, provided that:

"**(a) Study.** – Not later than 4 years after the date of enactment of this Act [Oct. 31, 1986], the Secretary of Labor and the Equal Employment Opportunity Commission, jointly, shall–

"(1) conduct a study–

"(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs,

"(B) If such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most effectively measure such ability and competency, and

"(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy, and

"(2) submit a report to the Speaker of the House of Representatives and the President pro tempore of the Senate that includes–

"(A) a description of the results of such study, and

"(B) a statement of the recommendations developed under paragraph (1)(C).

"(b) **Consultation requirement.** – The Secretary of Labor and the Equal Employment Opportunity Commission shall, during the conduct of the study required under subsection (a) and prior to the development of recommendations under paragraph (1)(C), consult with the United States Fire Administration, the Federal Emergency Management Agency, organizations representing law enforcement officers, firefighters, and their employers, and organizations representing older Americans.

"(c) **Proposed guidelines.** – Not later than 5 years after the date of the enactment of this Act [Oct. 31,1986] the Equal Employment Opportunity Commission shall propose, in accordance with subchapter II of chapter 5 of title 5 of the United States Code [5 U.S.C.A. § 551 et seq.] guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs."

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

. . .

(f) Lawful practices; age and occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization–

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such

employer,or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section–

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan–

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or

under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

. . .

(j) Repealed. Pub.L. 99-592, § 3(b), Oct. 31, 1986, 100 Stat. 3342

Age Discrimination in Employment Act, 29 U.S.C. (former) § 623(j) (West Supp. 1992) (repealed December 31, 1993)

(j) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983.

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken–

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purpose of this Act.

Effective and Termination Dates of 1986 Amendments.

Section 7 of Pub.L. 99-592 (West Supp. 1996) provided that:

* * *

"**(b) Effect on Existing Causes of Action.** – The amendments made by sections 3 and 4 of this Act [amending subsec. (i) of this section and section 630 of this title, and enacting provisions set out as a note under this section] shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 [this chapter] as in effect before January 1, 1987."

Termination of 1986 Amendment

Section 3(b) of Pub.L. 99-592 (West Supp. 1996) provided that: "The amendment made by subsection (a) of this section [enacting subsec. (j), formerly (i), of this section, relating to firefighters and law enforcement officers] is repealed December 31, 1993."

5 U.S.C. § 8335. Mandatory separation

* * *

(b) A firefighter who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which such firefighter becomes 55 years of age or completes 20 years of service if then over that age. A law enforcement officer who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which that officer becomes 57 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

29 U.S.C. § 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.] –

> (**a**) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;
>
> * * *

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED
TITLE III EXECUTIVE BRANCH
CHAPTER 16 STATE POLICE
STATE POLICE RETIREMENT SYSTEM

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Current through end of 1995 3rd Ex. Sess.

16.505 DEFINITIONS FOR KRS 16.510 TO 16.652

As used in KRS 16.510 to 16.652, unless the context otherwise requires:

(1) "System" means the State Police Retirement System created by KRS 16.510 to 16.652;

(2) "Board" means the board of trustees of the Kentucky Retirement Systems;

(3) "Employer" or "State Police" means the Department of State Police, or its successor;

(4) "Current service" means the number of years and completed months of employment as an employee subsequent to July 1, 1958, for which creditable compensation was paid by the employer and employee contributions deducted except as otherwise provided in KRS 61.555;

(5) "Prior service" means the number of years and completed months of employment as an employee prior to July 1, 1958, for which creditable compensation was paid to the employee by the Commonwealth. Twelve (12) months of current service in the system are required to validate prior service;

(6) "Service" means the total of current service and prior service;

* * *

(15) "Normal retirement date" means the first day of the month following a member's fifty-fifth birthday, except that for members over age fifty-five (55) on July 1, 1958, it shall mean January 1, 1959. A member of the State Police Retirement System, a member of the County Employees Retirement System or a member of the Kentucky Employees Retirement System covered by this section with twenty (20) or more years of service credit, at least fifteen (15) of which are current may declare his "normal retirement date" to be some date prior to his fifty-fifth birthday;

* * *

Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 96-160

In the Supreme Court of the United States

OCTOBER TERM, 1995

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAUL BOGAS
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

I. Whether the court of appeals correctly concluded that the Kentucky State Police Department failed to show that mandatory retirement at age 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986).

II. Whether the court of appeals correctly refused to deduct the amount of unemployment compensation received by state police officers from their back pay awards under the Age Discrimination in Employment Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-160

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 1-9) is reported at 860 F.2d 665 (*KSP I*). The second opinion of the court of appeals (Pet. App. 11-40) is reported at 80 F.3d 1086. The opinion of the district court dated December 17, 1986 (Pet. App. 41-49) is unreported.

JURISDICTION

The final judgment of the court of appeals was entered on April 1, 1996. Petitioners were granted an extension of time until July 30, 1996, in which to file their petition for certiorari. The petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the Kentucky State Police Department, et al. (petitioners or KSP), are responsible for enforcing state criminal and traffic laws. Under Kentucky law, Ky. Rev. Stat. Ann. § 16.505(15) (Michie/Bobbs-Merrill 1985), all Kentucky State Police officers must retire at age 55. On August 29, 1984, the Equal Employment Opportunity Commission (EEOC) filed this action against petitioners under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* (1982 & Supp. IV 1986). The complaint alleged that petitioners' retirement rule violated Section 4(a)(1) of the ADEA, which makes it unlawful for an employer "to discharge any individual * * * because of such individual's age." 29 U.S.C. 623(a)(1). The petitioners defended the retirement rule as a lawful "bona fide occupation qualification [BFOQ] reasonably necessary to the normal operation of the particular business" under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1).

2. Following a trial, the district court concluded that petitioners' mandatory retirement rule was justified as a BFOQ under Section 4(f)(1) of the ADEA. Pet. App. 41. In evaluating petitioners' BFOQ defense, the court purported to apply the two-part test approved in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-416 (1985): That the employer show that (1) the job qualifications at issue—here, adequate aerobic capacity and the absence of heart disease—are reasonably necessary to its particular business, and (2) that "substantially all people over the mandatory retirement age cannot safely perform the duties of

the job or that it would be highly impractical to deal with class members on an individual basis." Pet. App. 42-43. The district court noted that "[t]his is a close case," but found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance" of an officer's job "[e]ven though * * * the Department here has no in-service fitness screening." *Id.* at 43-44. Turning to the second part of the test, the court found that "there is a significant increase in coronary risk with age" and that "non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age." *Id.* at 44-45. By contrast, the court found that the requisite aerobic capacity "can be accurately tested" on an individual basis. *Id.* at 45.

3. The court of appeals reversed and remanded. Pet. App. 1-9. It held the district court's findings clearly erroneous because the lower court did "not take into account the total and crucial facts of this case." *Id.* at 3. The court held that petitioners had not shown that the absence of heart disease was a necessary characteristic of a Kentucky state officer. Reviewing the record, the court of appeals found that petitioners "repeatedly permitted officers under the age of 55 who had known health problems including heart conditions to remain on the job with no diminution of duties." *Id.* at 4. The court noted that KSP "has no program for testing the fitness of its officers either as to aerobic or cardiovascular health." *Id.* at 3-4. The court found it significant that KSP "permits officers to remain on the job in spite of known heart attacks or by-pass surgery." *Id.* at 3. The court observed that one officer "died of his fourth heart attack at the age of 49 while on a routine patrol

in his cruiser." *Id.* at 4. Accordingly, the court held that petitioners failed to show that 55-year age limit is a BFOQ. Judge Engel dissented because, in his view, the case "discloses no * * * lack of good faith by the Kentucky State Police." *Id.* at 9. On May 15, 1989, this Court denied the petitioners' petition for certiorari in *KSP I*. *Id.* at 10 (490 U.S. 1066).

4. On remand, the district court issued two judgments providing back pay and other relief to the officers. The April 5, 1993, judgment provided relief to those officers mandatorily retired between October 19, 1981, and December 31, 1986. Pet. App. 63. The May 23, 1994, judgment provided relief for those officers mandatorily retired between January 1, 1979, and October 19, 1981. *Id.* at 50. On June 21, 1994, the Commission and petitioners entered into a partial settlement agreement for the claims of 19 officers.

Petitioners appealed the district court's rulings regarding relief, including the district court's refusal to deduct the amount of unemployment compensation received by the officers after their retirement. The EEOC cross-appealed on other issues regarding the scope of relief. On April 1, 1996, the court of appeals issued its opinion affirming in part and reversing in part. Pet. App. 11-40. The court of appeals held, *inter alia*, that the district court did not abuse its discretion by refusing to deduct unemployment payments from the back pay awards made to the identified victims of petitioners' age discrimination. *Id.* at 39. The court of appeals indicated that it might have decided the issue differently as a matter of first impression because the State was both the discriminating employer and the administrator of the State's unemployment compensation program, but the court nevertheless was bound by its prior decision in

Rasimas v. *Michigan Department of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984), which held that unemployment benefits were "collateral benefits" and not deductible from back pay awards in Title VII cases. Pet. App. 38-39.

ARGUMENT

Most of petitioners' brief (Pet. 12-22) is directed to challenging the court of appeals' 1988 decision in *KSP I* on liability. Petitioners sought certiorari on that decision, which was denied. Pet App. 10. There is no reason to take a different course now. Both decisions of the court of appeals are entirely consistent with this Court's precedents, and they do not present a conflict calling for this Court's review.

1. In *Western Air Lines, Inc.* v. *Criswell*, *supra*, this Court adopted a two-part test (first developed in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)) that an employer must satisfy in order to justify its use of a mandatory retirement age. 472 U.S. at 414-416. The employer must show: (1) that a certain trait is a bona fide and reasonably necessary qualification for the position; and (2) that all or substantially all employees above the age limit lack the required qualification, or that it is impracticable for the employer to identify those who lack the required trait by individual testing.

Contrary to petitioners' assertion (Pet. 14-15), the court of appeals did not distort the first part of the *Criswell* test. The court simply held that petitioners failed to prove that the absence of heart disease is a necessary qualification for police officers. That holding is well supported by the record. The former director of KSP testified that the initial selection of age 55 as a mandatory retirement age had nothing to

do with health, fitness, or an officer's ability to do the job. *KSP I* EEOC C.A. Br. 22. The evidence also showed that petitioners permitted officers under age 55 who had known health problems, including heart disease, to remain on the job with no reduction in duties. Pet. App. 4. Moreover, petitioners allowed officers who had heart attacks and heart by-pass surgery to remain on the job. *Ibid.* One officer was retained even after he had three heart attacks. *Ibid.* Finally, petitioners made no effort to maintain or test the cardiovascular fitness of most of its officers. *Id.* at 3. Thus, by their own actions, petitioners have shown that lack of heart disease in its officers is not "reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). Accordingly, the court of appeals' decision is entirely consistent with *Criswell* and imposed no higher burden on petitioners than the plain language of the statute mandates.

Petitioners argue that the decision in *KSP I* requires it to adopt fitness testing programs in order to establish age as a BFOQ. That is not correct. The court of appeals held that a characteristic used to justify mandatory retirement "must be a trait that the employer at least attempts to require of employees of all ages." Pet. App. 8 (quoting *EEOC* v. *Pennsylvania*, 829 F.2d 392, 296 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988)). Here, the absence of testing, along with the other facts, demonstrated that cardiovascular and aerobic health was not reasonably necessary to the job positions at issue. The court did not state that testing is the only way an employer can attempt to require that trait of younger employees, nor did it impose any particular rule of testing on petitioners. And, in any event, petitioners' claim that

a testing program would be ineffective and unduly burdensome (Pet. 19-20) is belied by the record, which shows that KSP gives regular physical fitness tests to its "special response teams." Pet. App. 3 n.1, 4.[1]

Petitioners contend that courts of appeals "follow divergent roads in BFOQ analysis." Pet. 15. Petitioners state that the correct view is set forth in the First Circuit's decision in *EEOC* v. *City of East Providence*, 798 F.2d 524 (1986), the Eighth Circuit's decision in *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (1984), cert. denied, 474 U.S. 828 (1985), and the Fifth Circuit's decision in *EEOC* v. *Mississippi State Tax Commission*, 873 F.2d 97 (1989) (en banc), which treat the administration of fitness-for-duty tests as relevant but not dispositive evidence of whether the *Criswell* BFOQ standard had been met. Pet. 15-16. The conflicting view, according to petitioners, requires an employer to implement fitness tests for all officers in order to establish a BFOQ defense. Pet. 9-10. Petitioners claim that this view is reflected in the court of appeals' decision in *KSP I*, the Third Circuit's decision in *EEOC* v. *Pennsylvania*, 829 F.2d 392 (1987), cert. denied, 485 U.S. 935 (1988), and the Seventh Circuit's decision in *Heiar* v. *Crawford County*, 746 F.2d 1190, 1198 (1984), cert. denied, 472 U.S. 1027 (1985). Pet. 15-18. As discussed above, however, the court of appeals in *KSP I* did not rely solely on the absence of fitness tests for younger

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[1] Petitioners suggest that the district court found that fitness tests are "ineffectual for law enforcement officers of retirement age." Pet. 19. However, the district court found that testing could determine aerobic capacity and might identify individuals at high risk for cardiovascular disease, but could not decisively determine the absence of coronary disease. Pet. App. 45.

officers to support its conclusion that petitioners had failed to establish that lack of heart disease was a bona fide job qualification (Pet. App. 2-5). It also relied on the fact that younger officers who were known to lack the asserted qualification (*i.e.*, absence of heart disease) were allowed to continue working and that they performed competently. See also *EEOC* v. *Tennessee Wildlife Resources Agency*, 859 F.2d 24, 26 (6th Cir. 1988) (employer's failure to give fitness tests to officers was just one of four types of evidence relevant to the question whether a mandatory retirement age of 55 was a permissible BFOQ), cert. denied, 489 U.S. 1066 (1989).[2]

The Third Circuit in *Pennsylvania* stated that, "[b]efore a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages." 829 F.2d at 396. The court ruled that, "[u]ntil minimum standards are developed, implemented and enforced, the [agency] cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to [its] business." *Id.* at 395. That ruling does not mandate fitness testing but merely requires that, if fitness is a retention criterion for older workers, it must be a retention criterion for younger workers too. Nor did the Seventh Circuit in *Heiar* v. *Crawford County* "improperly augment[] the BFOQ test," as suggested by petitioners. Pet. 12. That case does not hold that testing is a requirement under the *Criswell* BFOQ

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[2] The court in *Tennessee Wildlife Resources Agency* applied the same "governing principles" that it applied in *KSP I*. 859 F.2d at 24.

analysis, but noted that testing is relevant evidence. 746 F.2d at 1197.

Thus, contrary to petitioners' claim, there is no conflict in the circuits regarding the elements of the *Criswell* BFOQ test. Although courts of appeals have sometimes differed in articulating the standard (see, *e.g.*, Pet. App. 7), their decisions are reconcilable. No court of appeals has imposed a requirement that the employer test all officers' fitness. Rather, courts have treated the employer's testing, or lack thereof, as relevant, but not dispositive, evidence to consider in reviewing mandatory retirement laws. Nor has any court of appeals held that failure to monitor the physical fitness of officers is irrelevant to the question whether physical fitness is a reasonably necessary job qualification. See, *e.g.*, *City of East Providence*, 798 F.2d at 530 ("a city's acceptance of low physical standards, coupled with other factors, might persuade a district court that physical fitness was not deemed a necessary job qualification by that police force[,] * * * [b]ut a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification"). The courts of appeals have not applied different BFOQ standards, but have simply reached different results based on different factual records. Under the legal standards this Court has established and that the courts of appeals have applied, cases are necessarily governed by pertinent factual findings, concerning such matters as job duties, the risks associated with the job positions, and the employer's actions.[3]

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[3] With the exception of the Fifth Circuit's decision in *Mississippi State Tax Commission*, *supra*, all of the cases

Petitioners note (Pet. 19) that the temporary exemption allowing mandatory retirement rules for state or local firefighters or law enforcement officers that took effect on January 1, 1987, as part of a legislatively mandated period of study, expired on December 31, 1993. Pet. App. 77, 79. The expiration of the temporary exemption, however, does not alter the fact that the court of appeals' decision in *KSP I* properly applied the *Criswell* BFOQ standard.[4] Petitioners argue (Pet. 19) that review is warranted because termination of the exemption means that "States once again must defend their mandatory retirement programs for law enforcement officers." However, they provide no evidence that States still have mandatory retirement provisions likely to present this issue to the courts. Indeed, while petitioners cite BFOQ cases decided by courts of appeals before 1990, they

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cited by petitioners pre-date the Court's denial of the petition for certiorari in *KSP I*. In *Mississippi State Tax Commission*, moreover, the Fifth Circuit did not decide the validity of the mandatory retirement rule for the State's tax commission officers, but simply "remand[ed] the case to the district court to consider fully the Commission's enforcement, or lack of enforcement, of the stated job qualifications of physical stamina and the ability to withstand stress." 873 F.2d at 100.

[4] Congress's unwillingness to extend the temporary exemption or amend the BFOQ provision provides further support for the result reached in *KSP I*. The study mandated by Congress yielded a unanimous report concluding that mandatory retirement of public safety officials is neither necessary nor desirable, and that individual fitness testing is a better means of assuring the performance of public safety forces. Intercollegiate Research Programs Center for Applied Behavioral Sciences, 1 *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs: Technical Report* 20 (Jan. 31, 1992).

point to no new case on the issue arising after the temporary exemption's expiration in 1993.

Petitioners also ask the Court (Pet. 21-22) to revisit its unanimous ruling in *Johnson* v. *Mayor & City Council of Baltimore*, 472 U.S. 353, 370 (1985), that the existence of a mandatory retirement age for federal public safety officials should not be given "any weight" when determining whether a State has established a BFOQ for its public safety officials. This request should be rejected. Petitioners' argument is that "[c]ongressional treatment of the retirement age for state and federal law enforcement seems anomalous." Pet. 21. Yet the Court in *Johnson*, in rejecting a similar argument, unanimously concluded that "almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a BFOQ within the meaning of the ADEA." 472 U.S. at 369.

2. Petitioners contend that the court of appeals erroneously affirmed the district court's decision not to deduct the amount of unemployment insurance received by the officers from the individual back pay awards, and that the courts of appeals differ as to whether "unemployment compensation may not, as a matter of law, be deducted from back pay awards" or whether the issue is within "the discretion of the trial court" (Pet. 23-25).

In urging the Court to adopt a rule which vests the district court with discretion to deduct unemployment compensation benefits from awards in an ADEA case, petitioners reason that the source of those benefits is not collateral because the State of Kentucky is both the source of the benefits and the defendant. Pet. 11, 25. However, petitioners point to no conflict in

the circuits regarding the issue as presented by petitioners: "Should back pay damages awarded to retired State employees in an age discrimination case be reduced—either as a matter of law or within the discretion of the trial court—by the State employer's payments of unemployment compensation to those retired State employees?" Pet. i.

Indeed, the two cases cited by petitioners do not address the question and arise under different statutes. See *Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975) (upholding district court's deduction of temporary wages and unemployment insurance in case arising under Title VII, 42 U.S.C. 2000e-5), aff'd in part, vacated in part, 434 U.S. 136 (1977); *Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir.) (upholding district court's deduction of Veterans Administration benefits from front pay awards in a case arising under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*), cert. denied, 116 S. Ct. 69 (1995). Nor does the decision in *Lussier* refer to a circuit split on the issue addressed by the court of appeals in the present case.[5] *Lussier* cites two cases arising under the ADEA in which it was held that trial courts have discretion to deduct unemployment compensation from back pay awards. *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 756 (7th Cir.), cert. denied, 464 U.S. 992 (1983); *Naton* v. *Bank of California*, 649 F.2d 691, 700 (9th Cir. 1981). Neither of those cases, however, con-

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[5] Moreover, two of the five ADEA cases *Lussier* cites from outside the Sixth Circuit involve offset of pension benefits (*Glover* v. *McDonnell Douglas Corp.*, 12 F.3d 845, 848 (8th Cir.), cert. denied, 114 S. Ct. 1647 (1994); *Doyne* v. *Union Elec. Co.*, 953 F.2d 447, 451-452 (8th Cir. 1992)), and a third involves offset of social security benefits (*EEOC* v. *Wyoming*, 771 F.2d 1425, 1431-1432 (10th Cir. 1985)).

flicts with the court of appeals' decision in the present case, which held that the district court "did not abuse its discretion in declining to deduct unemployment compensation." Pet. App. 39.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAUL BOGAS
Attorney
Equal Employment Opportunity Commission

SEPTEMBER 1996

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[6] Petitioners suggest (Pet. 23-25) that the court of appeals' decision in this case has created confusion within the Sixth Circuit because the court, while referring to no "abuse of discretion" by the district court in the present ADEA case, cited its prior decision in *Rasimas*, *supra*, which holds that unemployment payments are not deductible from back pay awards in Title VII cases. See also *Satty* v. *Nashville Gas Co.*, *supra*, and *Hawley* v. *Dresser Indus., Inc.*, 958 F.2d 720, 726 (6th Cir. 1992) (upholding district court's deduction of pension benefits from ADEA back pay award). Any inconsistency in Sixth Circuit decisions, however, is a matter for that court, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Supreme Court, U.S.
FILED
OCT 11 1996
CLERK

No. 96-160

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1996

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court to bring to the attention of the Court legislation that was enacted the date that the brief in opposition was filed in this case.

1. On September 30, 1996, Congress enacted and the President signed into law the Age Discrimination in Employment Amendments of 1996 (1996 Amendments) as Division A, § 101(a), Tit. I, § 119 of the Department of Defense Appropriations Act, 1997, Pub. L. 104-208 (110 Stat. 3009; 142 Cong. Rec. H11,651 (daily ed. Sept. 28, 1996).[1] Subsection 1 of the 1996 Amend-

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[1] The text of the 1996 Amendments is set forth at App., *infra*, 1a-5a. Bracketed cross-references in the Appendix re-

ments reenacts and amends Section 4(j) of the Age Discrimination in Employment Act of 1967 (ADEA), which permitted state and local governments to use age limitations when making hiring and discharge decisions regarding law enforcement officers and firefighters, as long as those limitations were in effect under state or local law on March 3, 1983. Pet. App. 77. Section 4(j) was originally added to the ADEA by the Age Discrimination in Employment Amendments of 1986 and took effect on January 1, 1987, but expired on December 31, 1993. See Pet. App. 77-79. In addition to reenacting the Section 4(j) exemption, Subsection 1(a) of the 1996 Amendments repeals the repealer of Section 4(j). App., *infra*, 1a. Subsection 3(b) of the 1996 Amendments makes the reenacted Section 4(j) effective from December 31, 1993, onward. App., *infra*, 5a.[2]

Subsection 1(b)(2), like the original Section 4(j), allows state and local governments to make hiring and discharge decisions pursuant to laws setting age caps for police officers and firefighters, provided the age limit was in effect under state or local law on March 3, 1983. App., *infra*, 1a. Subsection 1(b)(2) also expands Section 4(j) to allow age-based decisions made pursuant to a state or local law enacted after the enactment of the 1996 Amendments on September 30,

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flect technical corrections to the version appearing in the daily edition of the *Congressional Record*.

[2] Neither the original Section 4(j) exemption nor the new Section 4(j) applies to the present case because this case was filed in August 1984, prior to the effective date of either version. The original Section 4(j) exemption did not apply to causes of actions arising before January 1, 1987 (Pet. App. 78), and the reenacted Section 4(j) is only effective as of December 31, 1993 (App., *infra*, 5a).

1996. App., *infra*, 1a-2a. Subsection 1(b)(2) provides, however, that officers and firefighters may not be discharged before age 55 under mandatory retirement laws adopted after enactment of the 1996 Amendments. *Ibid.*[3] Thus, the 1996 Amendments provide that age-based hiring and discharge decisions made with respect to officers or firefighters after January 1, 1987, are permissible under the ADEA, without regard to whether age is a bona fide occupational qualification, as long as the action was taken pursuant to a statutory age-cap that is no lower than one in effect under applicable state or local law on March 3, 1983, or that was enacted under a state or local law after September 30, 1996, as long as the officer was not discharged prior to age 55.[4]

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[3] Section 4(j), as amended by the 1996 Amendments, is set forth at App., *infra*, 6a-7a.

[4] The amended Section 4(j) also requires that employers comply with Subsection 2(d)(2) of the 1996 Amendments, which requires the use of certain job performance tests by employers seeking an exemption under Section 4(j). Subsection 2(c) requires the Secretary of Health and Human Services, not later than four years after September 30, 1996, to develop and issue "advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters." App., *infra*, 4a. After issuance of those guidelines, Subsection 2(d)(1) requires the Secretary to "issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j)." App., *infra*, 4a. Effective on the date of issuance of those regulations, Subsection 2(d)(2) provides that employers seeking an exemption under Section 4(j) "shall provide to each firefighter or law enforcement officer who has attained [an age of retirement under Section 4(j)] an annual opportunity to demonstrate physical and mental fitness by passing a test described

2. The first question presented for review in this case is whether the court of appeals correctly held that the Kentucky State Police Department failed to show that mandatory retirement at age 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986). Petitioners filed their brief seeking certiorari before Congress enacted the 1996 Amendments. That legislation has rendered incorrect the premise of petitioners' contention (Pet. 19) that review of the court of appeals' 1988 decision in *KSP I* would now be appropriate because Section 4(j) expired in 1993. Thus, in light of the legislative reinstatement of Section 4(j), coupled with the additional (and new) approach when Subsection 2(d)(2) is implemented (see note 4, *supra*), the question of how state and local governments may have proved in the past that age is a bona fide occupational qualification for police officers is an issue of limited and diminishing importance.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

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in [Subsection 2(d)(1)], in order to continue employment." App., *infra*, 4a.

APPENDIX

1. The Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, Div. A, § 101(a), Tit. I, § 119 (110 Stat. 3009) (Sept. 30, 1996) provides:

Subsection 1. Age Discrimination Amendment

(a) REPEAL OF REPEALER.—Section 3(b) of the Age Discrimination in Employment Amendments of 1986 (29 U.S.C. 623 note) is repealed.

(b) EXEMPTION.—Section 4(j) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(j)), as in effect immediately before December 31, 1993—

(1) is reenacted as such section; and

(2) as so reenacted, is amended in paragraph (1) by striking "and the individual has attained the age" and all that follows through "1983, and" and inserting the following: ", the employer has complied with [Sub]section [2](d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such [Sub]section, and the individual has attained—

"(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

"(B)(i) if the individual was not hired, the age or hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or

"(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination

in Employment Amendments of 1996 and the individual was discharged, the higher of—

"(I) the age of retirement in effect on the date of such discharge under such law; and

"(II) age 55; and".

(c) CONSTRUCTION.—Nothing in the repeal, reenactment, and amendment made by subsections (a) and (b) shall be construed to make lawful the failure or refusal to hire, or the discharge of, an individual pursuant to a law that—

(1) was enacted after March 3, 1983 and before the date of enactment of the Age Discrimination in Employment Amendments of 1996; and

(2) lowered the age of hiring or retirement, respectively, for firefighters or law enforcement officers that was in effect under applicable State of local law on March 3, 1983.

Subsection 2. Study and Guidelines for Performance Tests

(a) STUDY.—Not later than 3 years after the date of enactment of this Act, the Secretary of Health and Human Services, acting through the Director of the National Institute for Occupational Safety and Health (referred to in this section as the "Secretary"), shall conduct, directly or by contract, a study, and shall submit to the appropriate committees of Congress a report based on the results of the study that shall include—

(1) a list and description of all tests available for the assessment of abilities important for the completion of public safety tasks performed by laws enforcement officers and firefighters.

(2) a list of the public safety tasks for which adequate tests described in paragraph (1) do not exist;

"(3) a description of the technical characteristics that the tests shall meet to be in compliance with applicable Federal civil rights law and policies;

(4) a description of the alternative methods that are available for determining minimally acceptable performance standards on the tests;

(5) a description of the administrative standards that should be met in the administration, scoring, and score interpretation of the tests; and

(6) an examination of the extent to which the tests are cost-effective, are safe, and comply with the Federal civil rights law and policies.

(b) CONSULTATION REQUIREMENT; OPPORTUNITY FOR PUBLIC COMMENT.—

(1) CONSULTATION.—The Secretary shall, during the conduct of the study required by subsection (a), consult with—

(A) the Deputy Administration of the United States Fire Administration;

(B) the Director of the Federal Emergency Management Agency;

(C) organizations that represent law enforcement officers, firefighters, and employers of the officers and firefighters; and

(D) organizations that represent older individuals.

(2) PUBLIC COMMENT.—Prior to issuing the advisory guidelines required in subsection ([c]), the Secretary shall provide an opportunity for public comment on the proposal [*sic*] advisory guidelines.

(c) ADVISORY GUIDELINES.—Not later than 4 years after the date of enactment of this Act, the Secretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters.

(d) JOB PERFORMANCE TESTS.—

(1) IDENTIFICATION OF TESTS.—After issuance of the advisory guidelines described in subsection ([c]), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j) of the Age Discrimination in Employment Act of 1967 with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j).

(2) USE OF TESTS.—Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

(e) DEVELOPMENT OF STANDARDS FOR WELLNESS PROGRAMS.—Not later than 2 years after the date of enactment of this Act, the Secretary

shall propose advisory standards for wellness programs for law enforcement officers and firefighters.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated $5,000,000 to carry out this section.

Subsection 3. Effective Dates

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this title and the amendments made by this title shall take effect on the date of enactment of this Act.

(b) SPECIAL EFFECTIVE DATE.—The repeal made by [Subsection 1](a) and the reenactment made by [Subsection 1](b)(1) shall take effect on December 31, 1993.

2. Section 4(j) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(j), as amended by Subsection 1 of the Age Discrimination in Employment Amendments of 1996, provides as follows:

> (j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
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> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with [Sub]section [2](d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such [Sub]section, and the individual has attained—
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> (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or
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> (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or
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> (ii) if the applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 and the individual was discharged, the higher of —

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.